SUPREME COURT OF THE UNITED STATES.

No. ~~177~~ 99 ~~26~~ 25 ~~24~~ 23

WILLIAM COOK, CHAMBERS ETTER, DANIEL ELAM, GEORGE B. SHEPPARD, JOSEPH H. BALDRIDGE, CHARLES A. HARPER, AND DANIEL P. SPARKS, PLAINTIFFS IN ERROR,

v.

ALBERT T. BURNLEY AND ROYAL A. PORTER.

IN ERROR TO THE DISTRICT COURT UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

G. S. GIDEON, Printer, No. 511 Ninth Street, Washington, D. C.

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Caption.

The United States of America, District Court of the United States, Eastern District of Texas. To wit:

At a term of the District Court of the United States, begun and held at the city of Galveston, in and for the Eastern District of Texas, on the first Monday in the month of May, in the year of our Lord, one thousand eight hundred and fifty-nine, to wit, on the thirteenth day of June, of said year, it being a day of said term. Present, the Honorable John C. Watrous, judge of said court, George Mason, Esq., district attorney, H. E. McCulloch, Esq., marshal, and James Love, Esq., clerk.

Among other proceedings, were the following, that is to say:

ALBERT T. BURNLEY et al.
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WILLIAM M. COOK et al. } Law, 441.

Be it remembered that heretofore, to wit, on the thirteenth day of October, in the year of our Lord, one thousand eight hundred and fifty-three, came the plaintiffs by their attorneys, and filed a petition herein, which is in the words and figures following, to wit:

Petition.

The United States of America, District of Texas.

To the Honorable John C. Watrous, judge of the District Court of the United States for the District of Texas, sitting at Galveston:

The petition of Albert T. Burnley, a citizen of the State of Kentucky, and of Royal A. Porter, a citizen of the State of Louisiana, complaining of William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, all of whom are citizens of the State of Texas, residing in the county of Calhoun, respectfully represents—

That heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-two, your petitioners were lawfully seised and possessed as tenants in common, the said Burnley of the undivided three-fourths, and the said Porter of the undivided one-fourth, of a certain tract or parcel of land, lying and situated in the said District and State of Texas, and county of Calhoun, and described and bounded as follows, to wit: situated on the western shore of Matagorda Bay, commencing at a stake that stands

upon the deep break of said bay, the same being the third and last landmark of the league that was surveyed for Santiago Gonzales; thence south forty-five degrees west, with the line of the afore-mentioned Gonzales, at two hundred and forty-five varas, there is a small mound called Arlialgus Mound, where there is a stake, from which to the east, at the distance of two varas, there is a palo blanco, with a mark of a letter A., and six inches in diameter; thence following the same line south forty-five degrees west, seven thousand nine hundred varas, to a stake in the plain, that serves as the second landmark for both surveys; thence north forty-five degrees west, with the lower line of Faustin Alvarado, seven thousand six hundred varas, to a stake in the plain, which is the third landmark of this survey, and of that of the said Alvarado; thence north forty-five degrees east, five thousand one hundred and forty varas, where a stake was driven on the deep break of said bay, for the fourth and last landmark of this survey; thence following the bends of the bay to the place of beginning, containing one league of land, and being the same granted by the proper authorities of Coahuila and Texas, to Juan Cano, with the appurtenances.

And while your petitioners were so seised and possessed of the said tract or parcel of land, the said defendants, on the day and year aforesaid, with force and arms entered into the said premises, and ousted and ejected your petitioners therefrom; and have ever since continued in such wrongful possession, taking and receiving the rents and profits of the said land, of the yearly value of fifteen thousand dollars, and other wrongs to your petitioners then and there committed, all of which is to the damage of your petitioners fifty thousand dollars.

Wherefore your petitioners bring their suit, and pray citations against the said defendants according to law, and judgment for the recovery and possession of their said premises, and for the mesne profits and damages aforesaid, and for costs and for general relief.

JONES & BALLINGER,
Plaintiffs' Attorneys.

And afterwards, on the twenty-first day of October, A.D. 1853, a citation in this cause was issued, in words and figures as follows, to wit:

United States District Court, District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon William M. Cook, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Mon-

day of January next, to answer the petition and complaint of Albert T. Burnley and Royal A. Porter against said William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, in an action of trespass to try title, and for damages in the sum of fifty thousand dollars, of which you will serve the said William M. Cook, the said defendant, with the accompanying copy of said petition.

Witness the Hon. John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this 21st day of October, A.D. 1853, and the seventy-eighth year of the independence of the United States of America.

[L. S.]

JAMES LOVE,
Clerk.

And afterwards, to wit, the marshal made return on said citation, in words and figures as follows:

Received, October 22, 1853, and executed on the 24th day of November, 1853, by giving the within defendant a true copy of this writ, and by giving him a copy of the petition, as furnished and certified by the clerk of this court.

BEN. McCULLOCH,
U. S. Marshal.

By WM. M. VARNELL,
Deputy.

And afterwards, on the 21st day of October, A.D. 1853, the following citation issued in this cause, in the words and figures as follows:

United States District Court, District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas:

You are hereby commanded to summon Chambers Etter, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer the petition and complaint of Albert T. Burnley and Royal A. Porter against said Chambers Etter, William M. Cook, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, in an action of trespass to try title, and for damages in the sum of fifty thousand dollars, of which you will serve the said defendant, Chambers Etter, with the accompanying copy of said petition.

Witness the Hon. John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this 21st day of October, A.D. 1853, and the seventy-eighth year of the independence of the United States of America.

[L. S.]

JAMES LOVE,
Clerk.

And afterwards the marshal made return on said citation in words and figures as follows:

Received, October 22d, 1853, and executed on the 24th day of November, 1853, by giving the within defendant a true copy of this writ, and by giving him a copy of the petition as furnished and certified by the clerk of this court.

BEN. McCULLOCH,
U. S. Marshal.
By WM. M. VARNELL,
Deputy.

And afterwards, on the 21st day of October, 1853, a citation issued in this cause in words and figures as follows:

United States District Court, District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon Daniel Elam, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer to the petition and complaint of Albert T. Burnley and Royal A. Porter, against Daniel Elam, William M. Cook, Chambers Etter, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, in an action of trespass to try title, and for damages in the sum of fifty thousand dollars, by which you will serve the said defendant, Daniel Elam, with the accompanying copy of said petition.

Witness the Honorable John C. Watrous, judge of said court, and the seal thereof, at the city of Galveston, this 21st day of
[L. S.] October, A.D. 1853, and the seventy-eighth year of the independence of the United States of America.

JAMES LOVE,
Clerk.

And afterwards, the marshal made his return on the said citation as follows, to wit:

Received, October 22d, 1853. Not found in my district, having died of yellow fever.

BEN. McCULLOCH,
U. S. Marshal.
By WM. M. VARNELL,
Deputy.

And afterwards, on the 21st day of October, A.D. 1853, the following citation issued in this cause, in words and figures as follows:

United States District Court, District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon George B. Sheppard, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer to the petition and complaint of Albert T. Burnley and Royal A. Porter, against said George B. Sheppard, William M. Cook, Chambers Etter, Daniel Elam, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, in an action of trespass to try title, and for damages in the sum of fifty thousand dollars, of which you will serve the said defendant, George B. Sheppard, with the accompanying copy of said petition.

Witness the Honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this 21st day [L. S.] of October, A.D. 1853, and the seventy-eighth year of the independence of the United States of America.

JAMES LOVE,
Clerk.

And afterwards, the marshal made return on said citation, in words and figures as follows:

Received, October 22, 1853. Not found in my district.

BEN. McCULLOCH,
U. S. Marshal.
By WM. M. VARNELL,
Deputy.

And afterwards, on the 21st day of October, A.D. 1859, a citation issued in this cause, in words and figures as follows:

United States District Court, District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon Joseph H. Baldridge, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer to the petition and complaint of Albert T. Burnley and Royal A. Porter against Joseph H. Baldridge, William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Charles A. Harper, and Daniel P. Sparks, in an action of trespass, to try title, and for damages in the sum of fifty thousand dollars, of which you will serve the said defendant, Joseph H. Baldridge, with the accompanying copy of said petition.

Witness the Hon. John C. Watrous, judge of said court, and the seal thereof, at the city of Galveston, on the 21st day of
[L. S.] October, A.D., 1853, and the seventy-eighth year of the independence of the United States of America.

JAMES LOVE,
Clerk.

And afterwards, the marshal made return on the said citation, in words and figures as follows:

Received, 22d October, 1853, and executed on the 28th of November, 1853, by giving the within defendant a true copy of this writ, and by giving him a copy of the petition, as furnished and certified by the clerk of this court.

BEN. McCULLOCH,
U. S. Marshal.
By WM. M. VARNELL,
Deputy.

And afterwards, on the 21st day of October, A.D. 1853, a citation issued in this cause, in words and figures as follows:

United States of America, District Court.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon Charles A. Harper, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer to the petition and complaint of Albert T. Burnley and Royal A. Porter against said Charles A. Harper, William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, and Daniel P. Sparks, in an action of trespass, to try title, and for damages in the sum of fifty thousand dollars, of which you will serve the said defendant, Charles A. Harper, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this 21st
[L. S.] October, A.D. 1853, and the seventy-eighth year of the independence of the United States of America.

JAMES LOVE,
Clerk.

And afterwards, the marshal made return on said monition, in words and figures as follows:

Received, October 22d, 1853, and executed on the 7th day of December, 1853, by giving the within defendant a true copy of this

writ, and by giving him a copy of the petition, as furnished and certified by the clerk of this court.

BEN. McCULLOCH,
U. S. Marshal.
By WM. M. VARNELL,
Deputy.

And afterwards, on the 21st day of October, A.D. 1853, a citation issued in this cause, in words and figures as follows, to wit:

United States District Court, District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon Daniel P. Sparks, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer to the petition and complaint of A. T. Burnley and Royal A. Porter against said Daniel P. Sparks, William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, and Charles A. Harper, in an action of trespass to try title, and for damages in the sum of fifty thousand dollars, of which you will serve the said defendant, Daniel P. Sparks, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, on the 21st day of October, A.D. 1853, and the seventy-fourth year of the independence of the United States of America. [L. S.]

JAMES LOVE,
Clerk.

Upon which said citation, the marshal afterwards made return in words and figures as follows:

Received 22d October, 1853. Not found in my district.

BEN. McCULLOCH,
U. S. Marshal.
By WM. M. VARNELL,
Deputy.

And afterwards, to wit, on the 9th day of January, A.D. 1854, the court here made an order in this cause, in words and figures as follows:

Order.

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v.
WILLIAM M. COOK et al.

On motion it is ordered that the clerk make publication of all the

depositions taken *de bene esse*, whether for plaintiffs or defendants, now on file in this cause, which was accordingly done in open court.

And afterwards, on the first day of February, A.D. 1854, the defendants, by their attorneys, filed their answer to plaintiffs' petition, in words and figures as follows:

Answer.

United States District Court.

A. T. BURNLEY & PORTER
v.
WILLIAM M. COOK and others.

And now at this term comes the defendants, by J. A. and Geo. W. Paschal, their attorneys; and they deny all and singular the allegations in the plaintiffs' petition, and they say, that they are not guilty in manner and form as the plaintiffs have thereof complained against them, and of this they put themselves upon the country, &c.

And for further plea in this behalf these defendants say, *actio non*, because they say, that they have been in possession of said premises in said petition described, under title, for more than three years next preceding the commencement of said suit; and this they are ready to verify, and pray judgment, &c.

And for further plea in this behalf these deponents say, *actio non*, because they say, that they have been in possession of said premises under color of title for more than three years next before the commencement of this suit; and this they are ready to verify, and pray judgment, &c.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

And afterwards, to wit, on the 1st day of February, A.D. 1854, Chambers Etter, one of the deponents, by his attorneys, filed his separate answer in words and figures, as follows:

Answer of Chambers Etter.

United States District Court, District of Texas.

ALBERT T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK, CHAMBERS ETTER, and others.

And now at this term comes the said Chambers Etter, and defends the wrong and injury, when, &c., and says he is not guilty of the force and injury in the plaintiffs' petition thereby alleged against him, and of this he puts himself on the country, &c.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

And for further plea in this behalf the defendant says, *actio non*, because he says that he and those under whom he claims had been in the possession of said premises in the plaintiffs' petition described, for more than three years next before the commencement of this suit, under title and color of title, and this he is ready to verify; and prays judgment, &c.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendant.

And afterwards, to wit, on the 1st day of February, A.D. 1854, the defendant, Charles A. Harper, by his attorney, filed his answer in words and figures, as follows:

Answer of Charles A. Harper.

ALBERT T. BURNLEY
v.
WILLIAM M. COOK, CHARLES A. HARPER et als. } Trespass, &c.

And now at this term comes the defendant, Charles A. Harper, and defends the wrong and injury, when, &c., and says he is not guilty of the several trespasses in the plaintiff's petition alleged, in manner and form as the plaintiff hath thereof complained, against him, and of this he puts himself on the country, &c.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

And for further plea in this behalf this defendant says, *actio non*, because he says that he and those under whom he claims had been in possession of the said described premises for more than three years, next before the commencement of this suit, under title and color of title, which he is ready to verify. Wherefore he prays judgment, &c.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

And afterwards, to wit, on the 13th day of February, 1854, the defendants filed their affidavit for a continuance, in words and figures, as follows:

Affidavit.

United States District Court, District of Texas.

ALBERT T. BURNLEY
v.
S. A. WHITE, WILLIAM M. COOK et als. } Trespass, &c.

United States of America, District of Texas.

THE SAME
v.
MOORE and SIEBALD. } Trespass, &c.

BURNLEY and PORTER
v.
WM. M. COOK and others.

Before the undersigned personally appeared S. A. White and William M. Cook, for themselves and the other defendants in this case, and say they are not ready for trial, for the want of the evidence of John Henry Brown, J. L. Allen, John Swartz, Sen., and Swartz, and Ernst, whose evidence is material to the defence of themselves and their co-defendants; that they have used due diligence to procure said evidence, by having said witnesses examined to prove prescription and other material issues; that the said witnesses stated general facts, but omitted to state a great number of particular facts and circumstances within their own knowledge; that the plaintiffs have recently caused said witnesses to be examined, which renders a further examination by the defendants necessary. These defendants say they are taken by surprise by the publication of the testimony of John J. Linn and Fernando de Leon, who were examined for the plaintiffs; that these witnesses swear to acts and facts which they are advised and believe they can disprove by witnesses residing in Mexico and elsewhere; that said evidence has been published too late to enable them to procure the rebutting evidence; that they know of no witnesses by whom they can prove the facts which they expect to prove by said Brown and others, except the said witnesses; that they expect to procure their evidence by the next term; that this application is not made for delay, but that justice may be done.

And further they say, that they expect to be able to procure the evidence of Ramoren Musquez, and others, to contradict the evidence of John J. Linn and Fernando De Leon, and also to be able to procure documentary evidence in Mexico to the same point.

S. A. WHITE.

Sworn to and subscribed before me, this 13th February, 1854.

JOHN S. JONES.
United States Commissioner.

And afterwards, to wit, on the 19th day of February, A. D. 1854, the court here made an order in this cause, in words and figures as follows:

Order.

A. T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK et als.

Ordered, that this cause be continued on the affidavit of defendants.

And afterwards, on the 23d day of February, A. D. 1854, an agreement between the parties was filed in words and figures as follows:

Agreement.

A. T. BURNLEY
v.
S. A. WHITE and others.

It is agreed in this case, and the several cases involving the controversies about the Coast League, where Burnley is a party, that all the pleas, except the general issue, be withdrawn, and that under this plea, the defendants may prove every fact which they could under any special plea whatever.

It is also agreed that the clerk may issue letters rogatory, directed to any judicial officer in Mexico, requiring the taking of the evidence of such witnesses as either party shall desire, to examine on such interrogatories as they shall give due notice of.

It is also agreed that such documentary evidence as shall be duly certified by the proper Secretary of the Mexican Government, transmitted through the Government of the United States, may be read in evidence if pertinent to the matter in controversy.

It is also agreed that such documents pertinent to the cause as may be certified by the Secretary of State of Coahuila, under the great seal, may be read in evidence.

It is also agreed that the depositions taken in this case, or hereafter taken, and agreements made, shall apply, as far as pertinent, to Burnley and Porter against Cook, Baldridge, and others.

That in any depositions taken in the above causes within one hundred miles of Indianola, under the acts of Congress, or otherwise, notice shall be given to Fletcher S. Stockdale on the part of plaintiffs, and S. A. White on the part of defendants.

All objections are withdrawn to the form or manner of taking the depositions which are on file in the above causes. It is agreed that the files of documents, &c., respecting the colonies of De Leon and Hewetson and Power, on file in other causes in this court, may be read in evidence in this case so far as material.

WILLIAM P. BALLINGER,
Attorney for Plaintiffs.
GEORGE W. PASCHAL,
For Defendants.

And afterwards, to wit, on the same day and year, an agreement was filed herein, which is as follows:

Agreement No. 3.

In the U. S. District Court, Galveston.

A. T. BURNLEY
v.
S. A. WHITE and others.

In the above cause, and in other causes of Burnley in said court, in which we are counsel, it is agreed that the signatures of Fernando de Leon, who acted as commissioner in extending said titles to the testimonio, shall be considered as proved without further evidence of handwriting; the defendants reserve fully the right to contest the validity of the act of said De Leon, or the sufficiency of his authority as commissioner.

W. P. BALLINGER,
Att'y for Plaintiffs.
J. A. & G. W. PASCHAL,
Att'y for Defendants.

And afterwards, on 24th March, A.D. 1854, the court here made an order as follows, to wit:

BURNLEY
v.
WHITE and others.

BURNLEY and PORTER
v.
COOK, BALDRIDGE and others.

On motion of plaintiffs' attorney, it is ordered that the clerk make publication of depositions on file in these two causes, which was accordingly done in open court.

And afterwards, on the 3d day of February, A.D. 1855, a subpœna was issued herein as follows, that is to say:

The United States of America, District of Texas.

The President of the United States of America to the marshal of the District of Texas, or his lawful deputies, greeting:

You are hereby commanded to summon Moses Morrisson, if he be found in your district, to be and appear forthwith before the honorable District Court of the United States for the District of Texas, at a court now in session at the city of Galveston, then and there to testify in behalf of the defendant in a suit wherein Albert T. Burn-

ley and Royal A. Porter are plaintiffs, and William M. Cook and others are defendants.

Herein fail not, and have you then and there this writ, certifying how you have executed the same.

Witness the Honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this second [L. S.] day of February, A.D. 1855.

JAMES LOVE,
Clerk.

Upon which said subpœna, the marshal made return in words and figures as follows:

Received Feb. 12, 1855, and not executed on account of not having time to execute and make return by the 14th inst.

JAMES SELKIRK,
Deputy Marshal.

And afterwards, on the 26th day of February, A.D. 1855, the defendants, by their attorney, filed an answer in this cause in words and figures as follows:

Answer.

ALBERT T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK, JOSEPH H. BALDRIDGE, J. W. BALDRIDGE, and D. P. SPARKS, CHAMBERS ETTER, DANL. ELAM, GEORGE B. SHEPPARD, CHARLES A. HARPER. } No. 441.

United States District Court, District of Texas, Galveston. January Term, 1855.

And now, at this term come the defendants and say, that they are not bound to make defence in said cause, because they say that, before the commencement of said suit, to wit, at the county of Calhoun, on the 4th day of February, A.D. 1852, the said Albert T. Burnley and one Levi Jones commenced their suit in the District Court of the County of Calhoun,—a court having jurisdiction of the subject-matter and of the parties,—against those defendants, James H. Baldridge, Joseph W. Baldridge, Sr., D. P. Sparks, and Solomon Cunningham. In which it was agreed that they the said plaintiffs, Albert T. Burnley and the said Levi Jones, were the lawful and rightful and lawful owners of the identical same tract of land described in the petition of the said Burnley and Porter in this honorable court, that is, that the said Burnley was the owner of an undivided three-fourths thereof, and the said Jones of the remaining one-fourth,

with the further averment that the interest of said Jones had been sold at marshal's sale to one (the said) Royal A. Porter, but, by valid agreements between said Porter and Jones, the said Jones remained in the possession and control and beneficial use thereof, and had until the first day of July, 1852 to redeem his said interest; and in which suit it was also averred, that the defendant, William M. Cook, had caused the location of a land certificate, for three hundred and twenty acres, to be made upon the north side of Powderhorn Bayou, along the said bayou and to the shore of Matagorda Bay; and it was also averred, that said location was wholly within the said Juan Cano League. The said petition avers among acts of trespass and waste, prays for damages, a perpetual *a perpetual* injunction, and for general relief, &c.

And these defendants further say, that the said Cook, James H. and Josiah W. Baldridge, were duly served with process in said cause; and the said defendants, afterwards, to wit, on the 22d day of March, A.D. 1852, being of the March Term of said court, entered their appearance in said cause; and by agreement of counsel, and the order of the said District Court of Calhoun County, said cause was transferred to the District Court of Harris County, a court having jurisdiction of said cause, and to which cause the defendants so sued plead on the 22d day of May, A.D. 1852, it being at the May Term of the said District Court of Harris County; in which pleading and answer they denied the legal validity of the said title of the said Juan Cano, and pleaded and relied upon the said location and survey of the said William M. Cook, and the title and possession of the said defendants derived under it. And, according to the statute in such cases made and provided, the defendants pleaded the Statute of Limitations, and filed a copy of the field-notes of the said William M. Cook, and pleaded the said title and the slander thereof, and the injury thereto in reconvention, and prayed that his title might be granted, and the said Burnley and Jones enjoined from doing any act to the prejudice of the same. And these defendants say that such proceedings were in said cause had, that afterwards, at said term, to wit, on the 28th day of May, A.D. 1852, the said cause came on to be heard on the pleadings, and the court dissolved the injunction and dismissed the cause, from which judgment the said Burnley and Jones, then and there, appealed to the Supreme Court of Texas. And these defendants say, that said record of appeal was afterwards, on the 29th day of December, A.D. 1853, filed in the said Supreme Court of Texas; and afterwards, to wit, on the 17th day of February, A.D. 1855, the judgment of the District Court was reversed, and the said cause remanded to the said District Court of Harris County for further proceedings therein, not inconsistent with the opinion by the court in said cause delivered.

And so these defendants say, that, at the time of the commence-

ment of the said suit, there was a suit pending in a court of competent jurisdiction, to wit, the Supreme Court of Texas, in favor of the said Albert T. Burnley and the said Levi Jones (who represented precisely the same interest of the said Royal A. Porter), and against the very same Cook, Baldridges, and their co-defendants, involving the very same title and matter in controversy which the present suit involves; and that pending this suit, the said cause has been remanded to the said District Court of Harris County, all of which, by reference to the record and proceedings in the said courts had, will more fully and at large appear; all of which this defendant is ready to verify, and prays judgment, &c.

WILLIAM M. COOK and co-defendants,
By J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

Before me, a commissioner of the United States District Court of the District of Texas, personally appeared William M. Cook, one of the defendants in the foregoing plea, who on oath says that the matters and things in the said foregoing plea pleaded are true in substance and in fact.

WILLIAM M. COOK.

Subscribed and sworn to, before me, this 27th day of February, A.D. 1855.

JOHN S. JONES,
Commissioner.

And, for further answer in this behalf, these defendants deny all and singular the allegations in said petition contained; and that they are not guilty of the said several trespasses in the said petition set forth, and of this they put themselves on the country, &c.

J. A. & GEO. W. PASCHAL,
For Defendants.

And for further plea in this behalf these defendants say, that they and those under whom they claim, have been in possession of the premises sued for under title and color of title for three years next before the commencement of said suit, and that the said plaintiffs' cause of action, if any they ever had, accrued more than three years next before the commencement of said suit.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

And these defendants here give notice to the court that they and those persons whose estate they have in the lands and tenements sued for, have had adverse possession of the same in good faith, for at least one year before the commencement of this suit, and that he and those persons, whose estate they have, have made permanent and valuable improvements on the lands sued for during the time they have

had possession of the same, to wit, warehouses, storehouses, wharves, dwelling-houses, gardens, fences, offices, and other valuable improvements, of the value of one hundred thousand dollars, the proof of which they will make at the trial, and if judgment be rendered against them, they pray to be allowed the value of said improvements.

J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

WILLIAM M. COOK.

Sworn to and subscribed before me, this 27th day of February, A. D. 1855.

JOHN S. JONES,
Commissioner.

And afterwards, on the 26th day of February, A. D. 1855, the court here made an order in this cause, in words and figures as follows:

Order.

ALBERT T. BURNLEY
v.
SAMUEL A. WHITE and others.

SAME
v.
GEORGE S. REUSS and others.

SAME
v.
MOORE & SIEBALD.

SAME
v.
WILLIAM M. COOK et al.

On the motion of the said defendants, the above entitled causes were construed on the affidavit of William M. Cook, one of said defendants, but it is agreed by said defendants, and thereupon ordered by the court, that the rule for trial on the defendants in said suits shall be peremptory at the next term of this court.

The suggestion of the death of John H. Baldwin, one of the defendants in the suit No. 213, being erroneous, is withdrawn, and it is stipulated by defendants and their counsel, that they will enter the appearance, on or before the first day of July next, in proper form as the representatives or legal heirs of the defendants in the above suits who have deceased, without scire facias or other proceedings. And that in case of the death of any of the defendants, before the next term of the court, the appearance of their heirs or legal representatives shall be entered, so as not to delay trial.

In suit No. 441, it is agreed that Samuel A. White be made a defendant, and he now enters his appearance therein, his plea of limitation to take effect as of this date.

And afterwards, on the 6th day of March, A.D. 1855, the court here made an order in this cause, in words and figures as follows:

Order.

ALBERT T. BURNLEY *v.* MOORE & LIEBALD.	No. 220.
THE SAME *v.* SAMUEL A. WHITE et al.	No. 213.
BURNLEY & PORTER *v.* WILLIAM M. COOK et al.	No. 441.

On this sixth day of March, A.D. 1855, came the parties aforesaid by their attorneys, and thereupon came on to be heard the motion of said defendants, filed February 27th, 1855, to appoint a surveyor in this case; upon consideration thereof, it is now here ordered, that the district surveyor of Calhoun county be, and he is hereby appointed surveyor in this cause. And it is ordered, that he go upon the Morales and Juan Cano grants, described in plaintiffs' petition, and make a survey of the said grants, and also of all locations and surveys made upon the said grants, under which the said defendants claim, as either of the said parties may direct; first having at least given ten days' notice to the parties or their attorneys, of the time of commencing the said surveys, and that he return to this court three plots of the said grants, locations, and surveys, describing the true and accurate boundaries thereof, duly certified, on or before the first Monday of January next.

And afterwards, to wit, on the second day of February, in the year of our Lord one thousand eight hundred and fifty-five, a subpœna was issued herein for Charles Hoffman, which is in the words and figures following, to wit:

Subpœna for Charles Hoffman.

The United States of America, District of Texas.

The President of the United States of America, to the marshal of the District of Texas, or to his lawful deputy, greeting:

You are hereby commanded to summon Charles Hoffman, if he be found in your district, to be and appear forthwith before the Honor-

able the District Court of the United States for the District of Texas, at a court now in session, at the city of Galveston, in said district, then and there to testify on behalf of the defendant, in a suit wherein Albert T. Burnley and Royal A. Porter are plaintiffs, and William M. Cook and others are defendants. Herein fail not, and have you then and there this writ, certifying how you have executed the same.

Witness the Honorable John C. Watrous, judge of said
[L. S.] court, and the seal of said court, at the city of Galveston, this second day of February, A.D. 1855.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, in the words and figures following, to wit:

Marshal's Return.

Received on the 10th of February, 1855, and executed same day, 10th of same month, February, 1855, by reading this writ to Charles Hoffman, and by commanding to be and appear, as herein directed.

BEN. McCULLOCH,
U. S. Marshal.

By GUSTAVUS SCHMIDT,
Special Deputy.

And afterwards, to wit, on the first day of March, of the year of our Lord one thousand eight hundred and fifty-six, a subpœna was issued herein, which is in the words and figures following, to wit:

Subpœna for W. F. Latham.

The United States of America, District of Texas.

The President of the United States of America, to the marshal of the District of Texas, or to his lawful deputy, greeting:

You are hereby commanded to summon W. F. Latham, if he be found in your district, to be and appear before the Honorable the District Court of the United States for the District of Texas, at Galveston, at a court now in session, to testify on behalf of the defendants in a certain cause, wherein Porter and Burnley are plaintiffs, and Samuel A. White and others are defendants. Herein fail not; and due return make of this writ.

Witness the Hon. John C. Watrous, judge of said court, and the
[L. S.] seal thereof, this first day of March, A.D. 1856.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, in the words and figures following, to wit:

Marshal's Return.

Received, March 1st, 1856, and executed by reading this summons to the within-named witness on the same day, in Galveston.

BEN. McCULLOCH,
U. S. Marshal.
By ROBT. C. W. REEL,
Deputy.

And afterwards, to wit, on the 27th day of February of the same year, the court here made an order in this cause, which is in the words and figures following:

Order of Court.

ALBERT T. BURNLEY et al.
v.
WILLIAM M. COOK et al. } Continued.

And afterwards, to wit, on the 26th day of March, of the year of our Lord one thousand eight hundred and fifty-seven, an agreement was filed herein, which is in the words and figures following, to wit:

Agreement.

ALBERT T. BURNLEY
v.
SAMUEL A. WHITE and others. }

It is agreed that these cases, and all others in which George W. Paschal and myself are counsel on opposite sides, shall be passed over at the April term, until Paschal returns,—say 15th May.

BALLINGER,
Attorney.
GEO. W. PASCHAL.

And afterwards, to wit, on the fourteenth day of December of the same year, the court here made an order in this cause, which is in the words and of the tenor following, that is to say:

Order of Court.

ALBERT T. BURNLEY & R. A. PORTER
v.
WILLIAM M. COOK et al. } No. 441.

By agreement of parties, it is ordered that this cause be continued.

And afterwards, to wit, on the thirteenth day of July, of the year of our Lord one thousand eight hundred and fifty-eight, the court here made an order in this cause, which is as follows, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

By agreement of parties by their counsel, and for cause shown, it is ordered, that this cause be continued until the next term of this court.

And afterwards, to wit, on the sixteenth day of February, of the year A.D. one thousand eight hundred and fifty-nine, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

Ordered that this cause be continued.

And afterwards, to wit, on the tenth day of May of the same year, a subpœna was issued herein, which is in the words and figures following, that is to say:

Subpœna for F. W. Latham.

The United States of America, Eastern District of Texas.

The President of the United States of America to the marshal of the Eastern District of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon F. W. Latham, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court now in session at the city of Galveston, then and there to testify, on behalf of the defendants, in a certain suit now pending and undetermined in said court, wherein Albert T. Burnley et al. are plaintiffs, and William M. Cook and others are defendants.

Witness the Honorable John C. Watrous, judge of said court, [L. S.] at the city of Galveston, this 10th day of May, A. D. 1859.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, which is in the words following, that is to say:

Marshal's Return.

Received, May 10th, 1859, and executed by reading this subpœna to within named party on the same day.

H. E. McCULLOCH,
U. S. Marshal.
By D. C. CADY,
Deputy.

And afterwards, to wit, on the seventeenth day of May of the same year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

A. T. BURNLEY et als.
v.
WILLIAM M. COOK et als. } No. 441.

By agreement of the parties, it is ordered that this cause be set down for trial on the thirteenth day of June next.

And afterwards, to wit, on the eleventh day of June of the same year, a subpœna issued herein, which is in the words and figures following, that is to say:

Subpœna for Charles Hoffman.

The United States of America, Eastern District of Texas.

The President of the United States of America to the marshal of the Eastern District of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon Charles Hoffman, if he be found in your district, to be and appear forthwith at a court now in session at the city of Galveston, in and for the Eastern District of Texas, at a court now in session at the city of Galveston, then and there to testify, on behalf of the plaintiffs, in a suit wherein Burnley & Porter are plaintiffs, and William M. Cook and others are defendants.

Witness the Hon. John C. Watrous, judge of said court, and the [L. S.] seal of said court, at the city of Galveston, this 11th day of June, A.D. 1859.

JAMES LOVE,
Clerk.

And thereupon indorsed is the marshal's return as follows, that is to say:

Marshal's Return.

Received, June 11th, 1859. Returned, June 13th, 1859. Executed by reading this subpœna to the within named Charles Hoffman in person.

H. E. McCULLOCH,
Marshal.
By D. E. CADY,
Deputy.

And afterwards, to wit, on the thirteenth day of June of the same year the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

ALBERT T. BURNLEY et al.
v.
WILLIAM M. COOK et al. } No. 441.

On motion of plaintiffs' attorney, and by leave of the court, the plaintiffs filed an amendment to his petition.

And afterwards, to wit, on the same day and year, the plaintiffs herein filed an amendment to their petition which is in the words and figures following, to wit:

Amendment to Petition.

BURNLEY and PORTER
v.
COOK and others.

United States District Court, Eastern District of Texas, at Galveston.

Plaintiffs amend their petition with leave of the court by indorsing on the back thereof that this action is brought as well to try title as for damages, and by inserting the name of Samuel A. White as a defendant, in accordance with the previous agreement and order of the court herein.

BALLINGER,
For Plaintiffs.

And afterwards, to wit, on the same day and year, came the plaintiffs, and filed a motion herein, which is in the words and figures following, that is to say:

Motion to strike out Plea.

United States District Court, Eastern District of Texas.

A. T. BURNLEY and R. A. PORTER
v.
WILLIAM M. COOK and others. } No. 441.

Now come plaintiffs by their attorneys and move the court to strike

out the plea in abatement or plea of another suit pending in the District Court of Harris County, filed by defendants in this suit on the twenty-sixth day of February, for the following causes:

1st. Said plea was filed after answer to the merits, on the first day of February, 1854.

2d. Said plea is not verified by affidavit.

3d. Said plea is not good and sufficient in law, and shows no sufficient facts to abate said suit.

And of this motion they pray judgment, &c.

JONES, BALLINGER & STOCKDALE,
Plaintiffs' attorneys.

And afterwards, to wit, on the fourteenth day of June of the same year, came the defendants, and filed their pleas herein, which is in the words and figures following, to wit:

Pleas of Defendants.

In the District Court of the United States for the District of Texas, sitting at Galveston.

SAMUEL A. WHITE, impleaded with WILLIAM M. COOK, JOSEPH H. BALDRIDGE, DANIEL SPARKS and others *adv.* ALBERT T. BURNLEY and ROYAL A. PORTER. } No. 441.

And now comes the said Samuel A. White, by his attorney, and says that he is not guilty of the said trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said plaintiffs have above thereof complained against him, and of this he puts himself upon the country.

And for further plea in this behalf, by leave of the court first had and obtained, the said Samuel comes and says, that he, the said Samuel, and those under whom he holds, have been in peaceable, continuous, and adverse possession of the premises in the plaintiffs' petition mentioned, under color of title, by a consecutive chain of transfer from and under the sovereignty of the soil, down to him the said Samuel, for three years next before the commencement of this suit, and that the said plaintiffs' cause of action, if any they have, accrued to them more than three years next before the commencement of this suit, and this the said Samuel is ready to verify, wherefore he prays judgment, &c.

And for further plea in this behalf, by like leave of the court first had and obtained, the said Samuel A. White comes and says that the said plaintiffs ought not to have and maintain their aforesaid action against this defendant, because he says that he, the said defendant, and those under whom he claims, have had the peaceable, continuous,

and adverse possession of the premises in the said plaintiffs' petition mentioned and specified, cultivating, using, and enjoying the same, for the space of ten years next before the commencement of plaintiffs' said suit against him, and that said plaintiffs' cause of action, if any they have, accrued more than ten years before said time, and this he is ready to verify, &c.

L. A. THOMPSON,
For Defendant.

And on the same day and year the foregoing pleas were filed by leave of the court, upon which the court here made an order, which is as follows, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

On motion of defendants' attorneys, and by leave of the court, the defendants filed their plea of limitations in this cause.

And afterwards, to wit, on the same day and year, came the plaintiffs and filed their demurrer to the pleas of limitations herein, which is as follows, to wit:

Demurrer to Pleas of Limitations.

United States District Court, Eastern District of Texas, at Galveston.

BURNLEY & PORTER
v.
COOK and others.

Now come the plaintiffs, and demur and except to the several pleas of limitation filed by defendants in this suit, for the following grounds:

1st. Said pleas are not, nor is any of them, sufficient in law for the want of an averment of the character of title or color of *color* with sufficient certainty, under which possession is claimed to have been held. Wherefore plaintiffs demur to said pleas respectively, and pray that they may be adjudged insufficient.

BALLINGER & STOCKDALE,
For Plaintiffs.

And afterwards, to wit, on the same day and year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

On this day came on to be heard the motion of plaintiffs, by their attorneys, to strike out the plea in abatement filed by defendants in this cause; after argument of counsel heard, because it seems to the court that the law is for the plaintiffs, it is ordered that the plea in abatement be stricken out.

And afterwards, to wit, on the same day and year, came the defendants herein, and filed their motion for a continuance, which said motion is in the words and figures following, to wit:

Motion for Continuance.

In United States District Court for the Eastern District of Texas, in Galveston.

BURNLEY et als.
v.
COOK et als. } No. 441.

In said cause comes the defendant, William M. Cook, and moves the court for a continuance of the same for cause, the want of testimony material to his defence, viz., the testimony of F. W. Latham; that deponent has used due diligence to procure the testimony of said Latham, and caused a subpœna to be issued for him from the said court, on the 10th day of May, 1859; that said witness was then in the city of Galveston, in said State, where said court holds its sessions, and said subpœna was served on said witness by the United States marshal for said district, on the 10th day of May, 1859; that said witness is not in attendance on said court, and the cause of his absence is unknown to deponent; that he, said witness, as deponent is informed and believes, resides in the county of Cameron, said State of Texas, but that at the time of service of said subpœna upon him, he was in the said city of Galveston; that the cause of the failure of the attendance of said witness at said court now in session, is unknown to deponent; that the testimony which deponent expects to establish by said witness he cannot procure from any other source known to him within the jurisdiction of this court nor of the United States; that said witness, as deponent is informed and believes, now resides in Cameron County, said state, and deponent expects to prove by him, said witness, that Manse, through whom plaintiff claims the property in controversy, was an alien enemy to the republic of Texas, at the time of the purported execution *of the purported execution* of the deed for the property in controversy to P.

W. Grayson; and that said Manse is now and always has been a citizen of a foreign country, and never a citizen of the republic of Texas nor of the United States; deponent further says, that a continuance in this case is not sought for delay, but that justice may be done.

WM. M. COOK.

Before the undersigned, Commissioner of the United States District Court for the Eastern District of Texas, personally appeared William M. Cook, a defendant in said cause, and upon oath says: I solemnly swear, the allegations in the foregoing motion for a continuance are true.

Sworn to in open court, June 15th, 1859.

JAMES LOVE,
Clerk.

And afterwards, to wit, on the same day and year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WM. M. COOK et als. } No. 441.

On this day came on to be heard the motion of defendants, upon affidavits filed for a continuance, for causes set forth in said affidavit. After argument of counsel heard, because it seems to the court that the law is for the plaintiffs, it is ordered that the motion be overruled.

And afterwards, to wit, on the fifteenth day of June, of the same year, came the defendants, and amended their answer therein in the words following, to wit:

Amended Answer.

In the District Court of the United States for the Eastern District of Texas, sitting at Galveston, May Term, 1859.

BURNLEY & PORTER
v.
COOK et als. } No. 441.

And now comes all the defendants in said cause except S. A. White, by their attorney, and the leave of the court being first had, amend their answer and say, that they are not guilty of the said supposed trespasses and injuries complained of by plaintiffs, in manner and form as the said plaintiffs in their petition have above complained against them, said defendants, and of this they, said defendants, put themselves upon the country.

And for further amended answer they, said defendants, say, that the said William M. Cook and those under whom he holds, and under whom they, said defendants, hold, have been in the peaceable adverse and continuous possession of the premises in plaintiffs' petition mentioned, under color of title, by a consecutive chain of transfer from and under the sovereignty of the soil down to him, William M. Cook, for three years next before the commencement of plaintiffs' suit, and that said plaintiffs' cause of action, if any they had, accrued more than three years next before the commencement of plaintiffs' suit, and this the said defendants are ready to

M. A. DOOLEY,
For Defendants, except White.

And afterwards, to wit, on the same day and year, came the defendants herein, and filed their motion for a change of venue, which said motion is as follows, to wit:

Motion for change of Venue.

In the United States District Court, for the Eastern District of Texas, in Galveston.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

In said cause comes the defendant, William M. Cook, in his own proper person, and moves the court for a change of venue in the same, for the reason that the judge of said court, in a certain pamphlet published by him, and entitled "Reply of Judge John C. Watrous to the Speech of Senator Houston," there appears the following, which is cut out of said pamphlet and here inserted for more certainty:

"Who was that man with dark eyes and brawny hands and swarthy look, that recently made a tour of the extreme west, loaded down with Houston Telegraphs, containing libellous articles against one John C. Watrous? He, we mean, who assured us that every paper in the State except the 'Valley,' had entered into a combination to copy from one another everything *mean* and *degrading* that could be said of this judicial functionary; combined to keep up the war until the said judge should be forced to leave the bench? He, we mean, who just wanted us to publish those scurrilous articles (copies of which he kindly left with us), for doing which we would be authorized to send papers to a Powderhorn merchant to the amount of two dollars and a half or even five dollars.

"Two dollars and a half or even five dollars for blackening and traducing the character of a fellow man! It was him who has been a litigant in the Federal Court of the State, and who did not have quite so good a title to a certain town tract as did somebody else;

consequently he was authorized to peddle Houston Telegraphs, and employ editors just to publish those articles. Judging from the recent transpirances he met with more success elsewhere than here; perhaps he increased the price; perhaps he found editors 'not quite so long State.'

"The person alluded to was one of the unsuccessful litigants in the suit of White et al. *v.* Burnley, decided by the Supreme Court of the United States, at the December term of that court, in the year 1857. My decision upon the law of the case was against the claim of this travelling disseminator of these 'libellous,' these 'scurrilous' articles,—the agent of these banded and affiliated presses, whose object is to keep up the war on me by copying from one into the other paper everything 'mean and degrading' that can be said of me, and by this means driving me from the bench. The Supreme Court affirmed the judgment which had been taken up upon a writ of error. This agent has other causes still pending in my court. My views of the law do not suit his task or his interest. Is he to be sustained in his attempt to drive me from the bench by popular clamor, when the cause of his hostility to me is a decision which has been revised and affirmed by the Supreme Court? Much of the clamor against me has been raised and kept up by those connected with this case. The opposition to me began in a regard to private interest, not the public good. It has been carried on by those who, like this travelling agent of this conspiracy to ruin me, have their *own private* ends to answer. Disappointed suitors in my court, disappointed gentlemen of the bar with high contingent fees, with now and then a member of the bar who would not be reluctant to fill a vacancy in the judgeship, now that the great questions of the statute of limitations, the border league question, and all the great questions which have divided and convulsed the country, are at rest. My position, when I went upon the bench was peculiar, and peculiarly trying. The jurisdiction was new and one of which much jealousy was entertained; the chancery practice was unknown to our system of State laws, and unfortunately for me, cases were commenced at the very opening of the court which required the decision of these questions, upon which there was so much feeling in the public mind. Then it should be borne in mind that I stood alone. One of the parties in my court is of necessity out of the State; the court has no jurisdiction when both of the parties are citizens of the State, and in almost every case the non-resident party is the plaintiff.

"If a case is tried in the State court, and the unsuccessful party complains of and assails the judge, the successful party is there to sustain him and counteract the injurious influence. Not so with a Federal judge; where he decides in favor of a foreign suitor there is no such friendly aid from the successful party. Sometimes, as is the case in the White and Burnley cases, the interests of a whole community are involved. And when that influence is brought to bear,

and travelling agents are sent out upon the errand of subsidizing the press, with orders to draw on a Powderhorn merchant; when the fact is revealed that the press of the State has been secured for the purpose of driving me from the bench; when the trunks of the dead are rifled of their contents, and the mutilated parts of a long-forgotten correspondence between partners in the law and their clients and friends are brought out in the Senate of the United States, with previous announcements and dramatic effect; when they are made the excuse for a new attack upon me, and this too just at the end of a very long and thorough examination of all the testimony against me, and in the absence of much that would have gone to my exculpation, and when the mighty revelation of the correspondence proves to be about that which had been examined to the entire satisfaction of the judiciary committee, in 1852, and resulted in my acquittal by a unanimous vote: when all these things are considered, together with the untiring and unyielding persistence in attack by my enemies, notwithstanding the decided majority by which my impeachment was voted down by the House of Representatives, what hope remains to him who is thus hunted and doomed and devoted to destruction? It is afforded by an abiding confidence in the chivalrous sense of justice in the people of the State. To that sense of justice I make my appeal. Not to interested suitors,—not to bonded and affiliated editors, but to that portion of the editorial fraternity who are uninfluenced by extraneous efforts, and to that portion of the public whose interests are not implicated in the controversy."

The said defendant avers that the personal allusions in the foregoing extracts are made to him (defendant), and so known and understood throughout said district, and the allusions in said extracts, viz., "this agent has cases still pending in my court," &c., refers to this defendant and to this case. This defendant avers that the said pamphlet has been widely circulated and extensively read in the said district, and the allusions therein made to this defendant and to this cause, will have a most prejudicial influence on his rights involved in the same if tried before a jury of said district. And the said defendant avers and verily believes that, on account of the said allusions to himself and his said cause, contained in said pamphlet, its general circulation in the said district, the importance and credence given to it as emanating from the honorable the judge of said district, his (defendant's) said cause is and will be prejudged. And he verily believes he cannot have a fair and impartial trial of said cause in said court; and as a further reason for a change of venue in said cause, said defendant is informed, avers, and believes, that the honorable the judge of said court had been consulted as counsel, and as such given advice and opinion on the title through which the plaintiffs claim.

WM. M. COOK.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

In the District Court of the United States for the Eastern District of the State of Texas, at Galveston.

Personally appeared before the undersigned authority, Wm. M. Cook, who, upon oath, said: I solemnly swear that I am the main and principal defendant in the above stated case, it being the same case in which I move for a change of venue, to which said motion this affidavit is attached and made part thereof, that the allegations in said motion for a change of venue, which are emphatically stated as of my own knowledge, are true; and those allegations in said motion stated on information and belief, I (deponent) believe to be true.

WM. M. COOK.

Sworn to and subscribed before me, this 16th day of June, 1859.
EDWARD T. AUSTIN,
U. S. Commissioner Eastern District of Texas.

And afterwards, to wit, upon the same day and year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

On this day came on to be heard the motion filed by defendants for a change of venue in this cause. After argument of counsel heard, because it seems to the court that the law is for the plaintiff, it is ordered that the motion be overruled.

And afterwards, to wit, on the same day and year, a subpœna was issued herein, which is in the words and figures following, to wit:

Subpœna for Charles Hoffman.

The President of the United States to the Marshal of the Eastern District of Texas, greeting:

You are hereby commanded to summon Charles Hoffman to be and appear forthwith before the United States District Court for the Eastern District of Texas, at the U. S. Court-house at Galveston, to testify and the truth to speak on behalf of Burnley & Porter, in a

certain cause depending in said Court, wherein Burnley & Porter are plaintiffs, and William M. Cook and others are defendants. Herein fail not, and due return make how you have executed this writ.

[L. S.] Witness, Hon. John C. Watrous, judge of said court, on the 15th day of June, 1859.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal in the words and figures following, that is to say:

Marshal's Return.

Rec'd June 16th, 1859, and served on the morning of the 17th. I handed the witness five dollars, to bear his expenses.

H. E. McCULLOCH,
By Deputy, WM. J. JONES.

And afterwards, to wit, on the sixteenth day of June of the same year, came the defendant and filed herein his motion, which in in the words and figures following, that is to say:

Motion as to Jurisdiction.

BURNLEY et als.
v.
COOK et als.

In the United States District Court for the Eastern District of Texas, Case No. 441.

In said cause come the defendants and move and ask the court, and claim as a right, under the agreement of attorneys filed in said cause, February 23d, 1854, and also claim as a right of plea to the jurisdiction of this court in said case, and as plea in abatement to said case, to introduce the record and proof of the case of Burnley and Jones *v.* Cook et als., No. 2412, now pending in Harris County District Court, State of Texas. Defendants aver that the last mentioned suit, in Harris county, is between the same parties in interest, both plaintiffs and defendants; and for the same cause of action by plaintiffs, and the same defences by said defendants. But to avoid verbiage in this motion, defendants refer particularly to the record of the said last-mentioned case in said county of Harris, which, by agreement of attorneys (hereto specially and particularly referred to), as a part of this motion, may and of right can be considered in evidence, &c. [here said agreement must be considered as inserted]; and defendants make said record of said case in the said county of Harris a part and parcel of this motion, and ask that it be considered

as herein inserted. Defendants aver that the said case in the county of Harris was long before the present case pending, and is still pending and undecided.

WM. M. COOK.

Before me, the undersigned authority, appeared William M. Cook, defendant in the foregoing case, who upon oath saith, "I solemnly swear that the allegations in the foregoing motion are true."

WM. M. COOK.

Sworn to and subscribed before me, at Galveston, this 16th June, 1859.

EDWARD T. AUSTIN,
U. S. Commissioner Eastern District of Texas.

And afterwards, to wit, on the same day and year, the court here made an order in this cause, which is in the words and of the tenor following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

On this day came on to be heard the plea of defendants to the jurisdiction of the court, filed on the 16th of June. After argument of counsel heard, because it seems to the court that the law is for plaintiffs, it is ordered that the plea be overruled.

And afterwards, to wit, on the same day and year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

On this day, on motion of attorneys for plaintiffs, and on the suggestion of the death of Chambers Etter and Daniel Elam, it is ordered, that this cause, as to the said Etter and Elam, be abated; and thereupon came a jury of good and lawful men, viz., R. B. Crozier, Stephen Richardson, John P. McCauley, Whitfield Davidson, Thomas Snipes, H. H. Hugh, John W. Burke, P. M. Carey, Luke Bryan, J. J. Dunn, William M. Phillips, and R. D. Johnson, who being elected, tried, and sworn, well and truly to try the issue joined, after some progress in the cause, and not having time to go through the same, by consent of the parties, were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the same day *day* and year, the court here *the court here* made an order in this cause, which is in the words and figures following, that is to say:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

By agreement of parties, it is ordered that Charles I. Rosignol be appointed to translate the testimonio on file in this case, which is in the Spanish language, into the English language.

And afterwards, to wit, on the sixteenth (16) day of June, of the year of our Lord one thousand eight hundred and fifty-nine, came the defendants herein, and filed their first bill of exceptions, which is in the words and of the tenor following, to wit:

1*st Bill of Exceptions.*

In the United States District Court for the Eastern District of Texas.
Term at Galveston, 1859.

BURNLEY & PORTER
v.
WM. M. COOK et als. } No. 441.

First Bill of Exceptions.

Be it remembered that the motion for a continuance in this cause, filed by the defendant, William M. Cook, on the 15th of June, 1859, which motion is as follows:

Motion for Continuance.

In the U. S. District Court for the Eastern District of Texas in Galveston.

BURNLEY et als.
v.
COOK et als. } No. 441.

In said cause comes the defendant, William M. Cook, and moves the court for a continuance of the same for cause, the want of testimony material to his defence in said court, viz., the testimony of F. W. Latham; that deponent has used due diligence to pro-

cure the testimony of said Latham, and caused a subpœna to be issued for him from the said court, on the 10th day of May, 1859; that said witness was then in the city of Galveston, said State, where said court holds its sessions, and said subpœna was served on said witness by the United States marshal for said district, on the 10th day of May, 1859; that said witness is not in attendance on said court, and the cause of his absence is unknown to deponent; that he, the said witness, as deponent is informed and believes, resides in the county of Cameron, said State of Texas, and that at the time of the service of said subpœna upon him he was in the said city of Galveston; that the cause of the failure of the attendance of said witness at said court now in session is unknown to deponent; that the testimony which deponent expects to establish by said witness he cannot procure from any other source known to him within the jurisdiction of this court, nor of the United States; that said witness, as deponent is informed and believes, now resides in Cameron county, said State; and deponent expects to prove by him, said witness, that Manse, through whom plaintiff claims the property in controversy, was an alien enemy to the Republic of Texas at the time of the purported execution of the deed for the property in controversy to P. W. Greyson, and that said Manse is now and always has been a citizen of a foreign country, and never a citizen of the Republic of Texas, nor of the United States. Deponent further says that a continuance in this case is not sought for delay, but that justice may be done.

WM. M. COOK.

Before me, the undersigned Commissioner of the United States District Court for the Eastern District of Texas, personally appeared William M. Cook, a defendant in said cause, and upon oath says: I solemnly swear the allegations in the foregoing motion for a continuance are true.

Sworn to in open court, June 15th, 1859.

JAMES LOVE,
Clerk.

Coming on to be heard, the court having considered it, overruled the same. To judgment and ruling of the court the defendant, by his attorney, excepted, and pray that this, his bill of exceptions, may be signed, sealed, and made part of the record in this cause, and it is done accordingly.

JOHN C. WATROUS.

And afterwards, to wit, on the fifteenth day of June of the same year, came the defendants herein and filed their second bill of exceptions, which is in the words and of the tenor following, to wit:

Second Bill of Exceptions.

In the United States District Court for the Eastern District of Texas, Term at Galveston, 1859.

BURNLEY and PORTER
v.
WILLIAM M. COOK et al. } No. 441.

Second Bill of Exceptions.

Be it remembered that the motion for a change of venue in this cause, filed by defendant, William M. Cook, on the 16th of June, 1859, which motion is as follows:

Motion for change of Venue.

In the United States District Court for the Eastern District of Texas, in Galveston.

BURNLEY and PORTER
v.
WILLIAM M. COOK et als. } No. 441.

In said cause comes the defendant, William M. Cook, in his own proper person, and moves the court for a change of venue in the same, for the reason that the judge of said court in a certain pamphlet published by him, and entitled, "Reply of Judge John C. Watrous to the Speech of Senator Houston," there appears the following, which is cut out of said pamphlet, and here inserted for more certainty.

"Who was that man, with dark eyes and brawny hands, of large size and swarthy look, that recently made a tour of the extreme West, loaded down with Houston Telegraphs, containing libellous articles against one John C. Watrous? He, we mean, who assured us that every paper in the State, except the 'Valley,' had entered into a combination to copy from one another everything mean and degrading that could be said of this judicial functionary — combined to keep up the war until the said judge should be forced to leave the bench? He, we mean, who just wanted us to publish those scurrilous articles (copies of which he kindly left us), for doing which we would be authorized to send papers to a Powderhorn merchant to the amount of two dollars and a half, or even five dollars. Two and a half, or even five dollars for blackening and traducing the character of a fellow-man! It was him who has been a litigant in the Federal court of the State, and who did not have quite so good a title to a certain town tract as did somebody else; consequently he was authorized to peddle Houston Telegraphs, and employ editors to publish those articles. Judging from recent transpirances, he met with more

success elsewhere than here. Perhaps he increased the price—perhaps he found editors 'not quite so long in the State.' The person alluded to was one of the unsuccessful parties to the suit of White et al *v.* Burnley, decided by the Supreme Court of the United States at the December term of that court, in the year 1857. My decision upon the law of the case was against the claim of this travelling disseminator of these 'libellous'—these 'scurrilous articles'—this agent of these banded and affiliated presses, whose object is to keep up the war on me by copying from one into the other paper everything 'mean and degrading' that can be said of me, and by this means drive me from the bench.

"The Supreme Court affirmed the judgment, which had been taken upon a writ of error. This agent has other cases still pending in my court. My views of the law do not suit his taste or his interest. Is he to be sustained in his attempt to drive me from the bench by popular clamor, when the cause of his hostility to me is a decision revised and affirmed by the Supreme Court? Much of the clamor against me has been raised and kept up by those connected with this cause. The opposition to me began in a regard to private interest, not the public good. It has been carried on, by those who, like this travelling agent of this conspiracy to ruin me, have their own private ends to answer. Disappointed suitors in my court; disappointed gentlemen of the bar, with high contingent fees; with now and then a member of the bar who would not be reluctant to fill a vacancy in the judgeship, now that the great questions of the Statute of Limitations, the Border League question, and all the great questions, which have divided and convulsed the country, are at rest. My position when I went upon the bench was peculiar, and peculiarly trying. The jurisdiction was new, and one upon which much jealousy was entertained. The chancery practice was unknown to our system of State laws; and, unfortunately for me, cases were commenced at the very opening of the court which required the decision of these questions, upon which there was so much feeling in the public mind. Then, it should be borne in mind that I stood alone. One of the parties in my court is of necessity out of the State. The court has no jurisdiction when both parties are citizens of the State, and in almost every case the non-resident party is the plaintiff. If a case is tried in a State court and the unsuccessful party complains of and assails the judge, the successful party is there to sustain him and counteract the injurious influence; not so with a Federal judge, where he decides in favor of a foreign suitor, there is no such friendly aid from the successful party. Sometimes, as in the case of the White and Burnley cases, the interests of a whole community are involved. And when that influence is brought to bear, and travelling agents are sent out upon the errand of subsidizing the press, with orders to draw on a Powderhorn merchant; when the fact is revealed that the press of the State has been secured

for the purpose of driving me from the bench; when the trunks of the dead are rifled of their contents, and the mutilated parts of a long-forgotten correspondence between partners in the law and their clients and friends are brought out in the Senate of the United States, with previous announcements and dramatic effect; when they are made the excuse for a new attack upon me, and this too just at the very end of a long and thorough examination of all the testimony against me, and in the absence of much which would have gone to my exculpation; and when the mighty revelation of the correspondence proves to be about that which had been examined to the entire satisfaction of the Judiciary Committee in 1852, and resulted in my acquittal by a unanimous vote: when all these things are considered, together with the untiring and unyielding persistence in attack by my enemies, notwithstanding the decided majority by which the impeachment was voted down by the House of Representatives, what hope remains to him who is thus hunted and doomed and devoted to destruction? It is afforded by an abiding confidence in the chivalrous sense of justice in the people of the State. To that sense of justice I make my appeal: not to interested suitors; not to bonded and affiliated editors; but to that portion of the editorial fraternity who are uninfluenced by extraneous efforts, and to that portion of the public whose interests are not implicated in the controversy."

The said defendant avers that the personal allusions in the foregoing extracts are made to him (defendant), and so known and understood throughout said district, and the allusion in said extracts, viz., "this agent has cases still pending in my court," &c., refers to this defendant and this case. This defendant avers that the said pamphlet has been widely circulated and extensively read in the said district, and the allusions therein made to this defendant and this cause will have a most prejudicial influence on his rights involved in said cause if tried before a jury of said district. And said defendant avers, and verily believes, that on account of the said allusions to himself and his said cause contained in said pamphlet, its general circulation in the said district, the importance and credence given to it as emanating from the honorable the judge of said district, his (defendant's) said case is, and will be, prejudged, and he verily believes he cannot have a fair and impartial trial of said cause in said court; and as a further reason for a change of venue in said cause, said defendant is informed, avers, and believes that the honorable the judge of said court had been consulted as counsel, and as such gave advice and opinion on the title through which plaintiffs claim.

WM. M. COOK.

In the District Court of the United States for the Eastern District of the State of Texas, at Galveston.

BURNLEY et als. v. WILLIAM M. COOK. } No. 441.

Personally appeared before the undersigned authority, William M. Cook, who upon oath said, I solemnly swear that I am the main and principal defendant in the above stated case, in which I move for a change of venue, to which said motion this affidavit is attached and made part thereof; that the allegations in said motion for a change of venue, which are emphatically stated as of my own knowledge, are true, and those allegations in said motion stated on information and belief, I (defendant) believe to be true.

WM. M. COOK.

Sworn to and subscribed before me, this 16th day of June, 1859.

EDWARD T. AUSTIN,
U. S. Commissioner Eastern District of Texas.

Coming on to be heard, the court, having considered it, overruled said motion. To which judgment and ruling of the court, defendant by his counsel excepted, and prays that this, his bill of exceptions, may be signed, sealed, and made a part of the record in this cause, and it is done accordingly.

JOHN C. WATROUS.

And afterwards, to wit, on the sixteenth day of June, of the same year, came the defendants herein, and filed their third bill of exceptions, which is in the words and of the tenor following, to wit:

Third Bill of Exceptions.

In the United States District Court for the Eastern District of Texas, ——— Term, at Galveston, 1859.

BURNLEY and PORTER v. WILLIAM M. COOK et al. } No. 441.

Third Bill of Exceptions.

Be it remembered, that the defendants in said cause having, on the 26th of February, 1855, filed their answer; in which, among other things, they plead to the jurisdiction of this court, which answer plea is as follows:

Answer of all the living Defendants, &c.

United States District Court, District of Texas, Galveston, January Term, 1855.

ALBERT T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK, JOSEPH H. BALDRIDGE, J. W. BALDRIDGE, H. D. P. SPARKS, CHAMBERS EITER, DANIEL ELAM, GEORGE B. SHEPPARD, CHARLES A. HARPER, and SAMUEL A. WHITE. } No. 441.

And now at this term come the defendants, and say that they are not bound to make defence in said cause, because they say that before the commencement of said suit, to wit, at the county of Calhoun, on the 4th day of February, A.D. eighteen hundred and fifty-two, the said Albert T. Burnley and one Levi Jones commenced their suit in the District Court of said county of Calhoun, a court having jurisdiction of the subject-matter, and of the parties against these defendants, James H. Baldridge, Joseph W. Baldridge, Sr., D. P. Sparks, and Solomon Cunningham, in which it was averred that they, the said plaintiffs, Albert T. Burnley and the said Levi Jones, were the lawful and rightful owners of the identical same tract of land described in the petition of the said Burnley and Porter, in this honorable court, is that the said Burnley was the owner of an undivided three-fourths thereof, and the said Jones of the remaining one-fourth, with the further averment that the interest of said Jones had been sold at marshal's sale to one, the said Royal A. Porter; but that by valid agreement between the said Porter and Jones, the said Jones remained in the possession and control and beneficial use thereof, and had until the 1st day of July, 1852, to redeem his said interest; and in which suit it was also averred that this defendant, William M. Cook, had caused the location of a land certificate for three hundred and twenty acres of land to be made upon the north side of Powderhorn Bayou, along said bayou and to the shore of Matagorda Bay; and it was also averred, that said location was wholly within the said Juan Cano league. The said petition avers many acts of trespass and waste, prays for damages and perpetual injunction, and for general relief, &c.

And these defendants further say, that the said Cook, James H. and Josiah W. Baldridge, were duly served with process in said cause; and the said defendants afterwards, to wit, on the 22d day of March, A.D. 1852, being at the March term of said court, entered their appearance in said cause, and by agreement of counsel and the order of the said District Court of Calhoun County, said cause was trans-

ferred to the District Court of Harris County, a court having jurisdiction of said cause, and to which cause the defendants so sued plead on the 22d day of May, A.D. 1852, it being at the May term of said District Court of Harris County, in which pleading an answer they denied the legal validity of the said title of the said Juan Cano, and pleaded and relied upon the said location and survey of the said William M. Cook, and the title and possession of the said defendants accrued under it, and according to the Statute of Limitations, filed a copy of the field-notes of the said William M. Cook, and pleaded the said title, and the slander thereof and injury thereto in reconvention; and prayed that his title might be quieted, and the said Burnley and Jones enjoined from doing any act to the prejudice of the same. And these defendants say that such proceedings were in said cause had, as that afterwards, at said term, to wit, on the 28th day of May, A.D. 1852, the said cause came on to be heard in the pleadings, and the court dissolved the injunction, and dismissed the cause; from which judgment the said Burnley and Jones then and there appealed to the Supreme Court of Texas; and these defendants say, that said record of appeal was afterwards, on the 29th day of December, A.D. 1853, filed in the said Supreme Court of Texas; and afterwards, to wit, on the 17th day of February, A.D. 1855, the judgment of the District Court was reversed, and the said cause remanded to the said District Court of Harris County, for further proceedings therein, not inconsistent with the opinion by the court in said cause delivered. And so these defendants say, that at the time of the commencement of said suit, there was a suit pending in a court of competent jurisdiction, to wit, the Supreme Court of Texas, in favor of the said Albert T. Burnley and the said Levi Jones (who represented precisely the same interest of the said Royal A. Porter), and against the very same Cook, Baldridges, and their co-defendants, involving the very same title and matter in controversy, which the present suit involves; and that pending this suit, the said cause has been remanded to the said District Court of Harris County; all of which, by reference to the record and proceedings in the said cause had, will more fully and at large appear; all of which this defendant is ready to verify, and prays judgment, &c.

WM. M. COOK and co-defendants,
By J. A. & GEO. W. PASCHAL,
Attorneys for Defendants.

Before me, a commissioner of the United States District Court of the District of Texas, personally appeared William M. Cook, one of the defendants in the foregoing plea, who on oath says, that the matters and things in the said foregoing plea pleaded are true in substance and in fact.

Subscribed and sworn to this day of February, A.D. 1855.

And for further answer in this behalf, these defendants deny all and singular the allegations in the said petition contained, and that they are not guilty of the said several trespasses in the said petition set forth, and of this they put themselves upon the country, &c.

J. A. & GEO. W. PASCHAL,
For Defendants.

And for further plea in this behalf, these defendants say, that they and those under whom they claim have been in possession of the premises sued for, under title and color of title, for three years next before the commencement of said suit; and that the said plaintiffs' cause of action, if any they ever had, accrued more than three years next before the commencement of said suit.

J. A. & GEO. W. PASCHAL,
For Defendants.

And these defendants here give notice to the court, that they and those persons whose estate they have in the lands and tenements sued for, have had adverse possession of the same in good faith for at least one year before the commencement of this suit; and that he and those persons whose estate they have, have made permanent and valuable improvements in the lands sued for during the time they have had possession of the same, to wit, warehouse, storehouse, wharves, dwelling-houses, gardens, fences, offices, and other valuable improvements of the value of one hundred thousand dollars, the proof of which they will make at the trial; and, if judgment be rendered against them, they pray to be allowed the value of said improvements.

J. A. & GEO. W. PASCHAL,
Att'ys for Defendants.
WM. M. COOK.

Sworn to and subscribed before me, this 27th day of February, A.D. 1855.

JOHN S. JONES,
Commissioner.

And the plaintiffs in said cause, by their counsel, afterwards, on the 13th day of June, 1859, filed their motion to strike out said answer and plea, which motion of plaintiffs is as follows:

Motion to strike out plea in Abatement.

U. S. District Court, Eastern District of Texas.

A. T. BURNLEY and R. A. PORTER
v.
W. M. COOK and others.

Now come plaintiffs, by their attorneys, and move to strike out the plea in abatement, or plea of another suit pending in the District

Court of Harris County, filed by defendants in this suit on the 26th day of February, 1855, for the following causes:

1st. Said plea was filed after answer to the merits on the 1st day of February, 1854.

2d. Said plea is not verified by affidavit or properly sworn to.

3d. Said plea is not good and sufficient in law, and shows no sufficient facts to abate this suit.

And of this motion they pray judgment, &c.

JONES & BALLINGER & STOCKDALE,
Plaintiffs' Attorneys.

And the same coming on to be heard, was considered by the court, and the court sustained said motion of plaintiffs. To which judgment and ruling of the court defendant, by his counsel, excepted and pray that this his bill of exceptions may be signed, sealed, and made a part of the record in this cause.

And it is done accordingly.

JOHN C. WATROUS. [L.S.]

And afterwards, to wit, on the same day and year, came the defendants and filed their fourth bill of exceptions herein, which is in the words and figures following, to wit:

Fourth Bill of Exceptions.

BURNLEY & PORTER
v.
WILLIAM M. COOK and others.

Be it remembered, that after the court had overruled the application of the defendants for a continuance, and for a change of venue, and had stricken out the answer and plea of defendant to the jurisdiction of the court, and had ruled the parties to trial, defendants' counsel thereupon claimed the right to introduce evidence at this stage of the cause, to show that the court had no jurisdiction of this action under the following agreement of attorneys, and under the following motion:

Agreement of Parties.

A. T. BURNLEY
v.
S. A. WHITE and others.

It is agreed in this case, and the several cases involving the controversies about the coast leagues, wherein Burnley is a party, that all the pleas except the general issue be withdrawn, and that under this plea the defendants may prove every fact which they could under

any plea whatever. It is also agreed that the clerk may issue letters rogatory directed to any general officer in Mexico, requiring the taking of the evidence of such witnesses as either party shall desire to examine on such interrogatories as they shall give due notice of. It is also agreed, that such documentary evidence shall be duly certified by the proper secretary of the Mexican Government, transmitted through the Government of the United States, may be read in evidence if pertinent to the matters in authority. It is also agreed, that such documents pertinent to the cause, as may be certified by the secretary of state of Coahula under the great seal, may be read in evidence. It is also agreed, that the depositions in this case, taken or hereafter taken, and agreements made, shall apply, so far as pertinent, to Burnley & Porter *v.* Cook, Baldridge and others; that in any depositions taken in the above causes, within 100 miles of Indianola, under the acts of Congress or otherwise, notice shall be given to Fletcher & Stockdale on the part of plaintiffs, and S. A. White on the part of defendants. All objections are withdrawn to the form or manner of taking the depositions, which are on file in the above causes. It is agreed that the files of documents, &c., respecting the colonies of De Leon and Power & Hewetson, on file in other causes in this court, may be read as evidence in this case so far material.

W. P. BALLINGER,
Attorney for Plaintiffs.
G. W. PASCHAL,
Attorney for Defendants.

Motion.

In the United States District Court, for the Eastern District of Texas.

BURNLEY et als. *v.* COOK et als. } Case No. 441.

In said cause come the defendants and move and ask the court, and claim as a right under the agreement of attorneys in said cause, filed February 23d, 1854, and also claim as a right of plea, to the jurisdiction of this court, in this court, in said case, and as pleas in abatement to said case, to introduce the record and proof of the case of Burnley and Jones *v.* Cook et als., No. 2412, now pending in Harris County District Court, State of Texas. Defendants aver that the last-mentioned suit in Harris County, is between the same parties in interest, both plaintiffs and defendants, and for the same cause of action by said plaintiffs, and the same defences by said defendants. But to avoid verbiage in this motion, defendants refer particularly to the record of the said last-mentioned case, in the said county of Harris, which (by agreement of attorneys, hereto

specially and particularly referred to), as a part of this motion, may, and of right can be, introduced in evidence, &c. (here said agreement must be considered as inserted), and defendants make said record of said case, in the said county of Harris, a part and parcel of this motion, and ask that it be considered as though herein inserted. Defendants aver that the said case, in the county of Harris, was long before the present case pending, and is still pending and undecided.

WM. M. COOK.

Before the undersigned authority appeared William M. Cook, defendant in the foregoing case, who upon oath said: I solemnly swear that the allegations in the foregoing motion are true.

WM. M. COOK.

Sworn to and subscribed before me, at Galveston, this 16th June, 1859.

EDWARD T. AUSTIN,
U. S. Commissioner, Eastern District of Texas.

And thereupon the court refused to admit the said evidence by defendants, and ruled that the same was wholly inadmissible, incompetent, and improper, in the manner offered by said defendants, and the court refused to frame or submit any issue to the jury or to the jurisdiction of the court, to admit said evidence. To all which judgments and rulings of the court defendant by his counsel excepted, and prays the court that this his bill of exceptions may be signed, sealed, enrolled, and made a part of the record in this cause; and it is done accordingly.

JOHN C. WATROUS. [L. S.]

And afterwards, to wit, on the seventeenth day of June of the same year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

Further progress having been made in this cause, and not having time to go through the same, the jury, by consent of parties, were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the eighteenth day of June of the same year, a subpœna was issued herein, which is in the words and figures following, to wit:

Subpœna for John F. Segui.

The United States of America, Eastern District of Texas.

The President of the United States of America to the marshal of the Eastern District of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon John F. Segui, if he be found in your district, to be and appear forthwith before the Honorable the District Court of the United States, at a court now in session at the city of Galveston, in and for the Eastern District of Texas, then and there to testify on behalf of the defendants, in a suit wherein Albert T. Burnley et al. are plaintiffs, and William M. Cook et al. are defendants. Herein fail not.

[L. S.] Witness the Honorable John C. Watrous, judge of said court, at the city of Galveston, this 18th day of June, A.D. 1859.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, which is in the words and figures following; that is to say:

Return of Marshal.

Received, June 18th, 1859, and executed same day by summoning the within-named witness in person.

H. E. McCULLOCH,
U. S. Marshal.
By L. W. STOY,
Deputy.

And afterwards, to wit, on the twentieth day of June, of the same year, the court here made an order in this cause, which is in the words and figures following; that is to say:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

Further progress having been made in this cause, and not having gone through the same, by consent of parties, the jury were permitted to disperse until 10 o'clock to-morrow.

And afterwards, to wit, on the twenty-first day of June of the same year, there was a subpœna issued herein, which is in the words and of the tenor following; that is to say:

Subpœna for C. C. Hoffman.

The United States of America, Eastern District of Texas.

The President of the United States of America, to the marshal of the Eastern District of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon Charles C. Hoffman, if he be found in your district, to be and appear before the Honorable the District Court of the United States, at a court now in session at the city of Galveston, in and for the Eastern District of Texas, at the city of Galveston, then and there to testify on behalf of the defendants in a certain suit now pending in said court, wherein Albert T. Burnley and Royal A. Porter are plaintiffs, and William M. Cook and others are defendants. Herein fail not.

Witness the Hon. John C. Watrous, judge of said court, at the city of Galveston, this 21st day of June, A. D. 1859.

[L. S.]

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, which is in the words and figures following, to wit:

Marshal's Return.

Received, June 21, 1859, and executed the same day by summoning the within-named witness in person.

H. E. McCULLOCH,
U. S. Marshal.
By S. W. STOY,
Deputy.

And afterwards, to wit, on the same day and year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

Further progress having been made in this cause, and not having gone through the same, by consent of parties, the jury were permitted to disperse until 10 o'clock to-morrow.

And afterwards, to wit, on the twenty-second day of June of the same year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order of Court.

BURNLEY & PORTER
v.
WM. M. COOK et als. } No. 441.

Further progress having been made in this cause, and not having gone through the same, the jury, by consent of parties, were permitted to disperse until 10 o'clock to-morrow.

And afterwards, to wit, on the twenty-third day of June, of the same year, a subpœna was issued herein, which is in the words and figures following, to wit:

Subpœna for Witness, Myers & Sawyer.

The United States of America, Eastern District of Texas.

The President of the United States of America to the marshal of the Eastern District of Texas, greeting:

You are hereby commanded to summon James Myers and Capt. Sawyer to appear forthwith before the judge of the United States District Court, at the court-house in Galveston, to testify, and the truth to speak, in behalf of William M. Cook et als., in a cause now on trial in said court, wherein Burnley & Porter are plaintiffs, and William M. Cook et als. are defendants. Herein fail not, and make due return how you have executed this writ.

Witness the Hon. John C. Watrous, judge of said court, on the 23d June, A.D. 1859.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, in the words and figures following, to wit:

Marshal's Return.

Received, June 23, 1859, and executed, by reading this subpœna to the within-named James Myers and Capt. Sawyer in person.

H. E. McCULLOCH,
U. S. Marshal.
By D. C. CADY,
Deputy.

And afterwards, to wit, on the same day and year, the court here made an order in this cause, which is in the words and figures following, that is to say:

Order.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

Further progress in this cause having been made, and not having gone through the same, the jury were permitted to disperse until the calling of the cause to morrow, by consent of parties.

And afterwards, to wit, on the twenty-fourth day of June, of the same year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order.

BURNLEY & PORTER
v.
WM. M. COOK et als. } No. 441.

Further progress having been made in this cause, and not having gone through the same, the jury were permitted to disperse until the calling of the cause to-morrow, by consent of parties.

And afterwards, to wit, on the twenty-fifth day of June, of the same year, the court here made an order in this cause, which is in the words following, to wit:

Order.

BURNLEY & PORTER
v.
WM. M. COOK et als. } No. 441.

Further progress having been made in this cause, and not having time to go through the same, by consent of parties, the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-seventh day of June of the same year, the court here entered an order in this cause, which is in the words and figures following, to wit:

Order.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

Further progress having been made in this cause, and not having time to go through the same, the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-eighth day of June of the same year, the court here made an order in this cause, which is in the words and figures following, to wit:

Order.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

Further progress having been in this cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-ninth day of June, of the same year, the court here made an order in the cause as follows, to wit:

Order.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

Further progress having been made in this cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the thirtieth day of June, of the same year, the court here rendered verdict and judgment in this cause in the words following, to wit:

Judgment and Verdict.

BURNLEY & PORTER
v.
WILLIAM M. COOK et al. } No. 441.

The argument of counsel having closed after the charge of the court, the jury retired to consider of their verdict. After some time they returned into court the following verdict: "We the jury find for the plaintiffs, and one cent in damages. R. D. Johnson, foreman." It is therefore considered by the court that the plaintiffs recover of the defendants the premises in their petition mentioned, according to the metes and bounds therein described, and one cent in damages, in manner and form by the jurors aforesaid assessed, and also dollars and cents, their costs about their suit in this behalf expended. And it is further ordered and considered by the court that the writ of habere facias possessionem issue to the

marshal of this district, commanding him to put the plaintiffs in possession of the premises aforesaid.

And on the same day and year, and before the retirement of the jury, the defendants filed herein their fifth bill of exceptions, which said bill is in the words and figures following, to wit:

Bill of Exceptions, No. 5.

In the District Court of the United States for the Eastern District of Texas. May term, at Galveston, 1859. No. 441.

ALBERT T. BURNLEY AND ROYAL A. PORTER
v.
WILLIAM M. COOK and others.
} Trespass to try title.

Be it remembered, that on the trial of this cause, the plaintiffs, to maintain the issues on their part, offered in evidence a document purporting to be the original testimonio, in Spanish, of a colonial grant in the colony of Martin de Leon, made to Juan Cano, as follows:

Testimonio to Juan Cano.

Sello Segundo. Doce Reales.

Para los anos de mil octrocientos veinte y seis y veliocientos veinte y siete, 28, 29, 30, 31 y 32, 33 y 34, y 35.

FLORES,
GARCIA.

Presentacion.

Senor Comisionado: Juan Cano casado y con familia ante V. en la mejor forma que haya lugur de derectro me presento y pongo: Que siendo y efectibo que soy uno de los colonos admitidos per el Empresario actual y hayandose sui el titulo de posecion del terreno que me corresponde como tal poblador a V. vecerro para que usando de la facultad que le consedo laley. Se sirva atorga me la medida y. (A line here in the crease of the paper is illegible.) esta situado sobre la banda occidental de la Laguna de Mata Gorda colindante perel sud este con el sitio que se medio á Santiago Gonzales el mismo que es baldio de la que recivire Justicia Guadalupe Victoria marzo veinte y tres de mil veliocientos treinta y cinco. Juan Cano. Villa de Guadalupe Victoria veinte y tres demurre de mil veliocientos treinta y cinco.

Decreto al Empresario.

Pase esta nistancia al ciudadano Placido Benuoidos para que informe á continuacion se es efectivo ó nolo que espone el interesado y la debuelba. Leon.

Ynforme del Empresario.

Senor Comisionado. En atencion al anterior decreto de V. que antecede deleo se cirte. Que el saliulante es uno delos coleres admitidos por mi para poblar los terrenos que ami anterior há demarcado el Supremo Gobierno del Estado y tiene las calidades que laley prebiene perloque le considero acredor á la Gracia que pine y por que el terreno que saliala esvaldio y no perjudica á corporacion ni tercero alquuo siendo cu auto teugo que desir á V. sobre el particular. Guadalupe Victoria, Marzo veinte y cuatro de mil octrocientos vienta y cinco. Placido Benavides.

Decreto al Agrivienser.

Villa de Guadalupe Victoria Marzo veinte y cuatro de mil octrocientos treinta y cinco. Al agrivienser ciudadano Santiago Kerr para que practicando sertificamente las medidas que se soleietan las anote á continuacion y la debuelba. Leon.

Notas de Medidas.

Senor Comisionado: El terreno que se medio para Juan Cano segun el decreto que de V. antecede está situado sahre la banda occidental de la Laguna Madre de Mata Gorda, comensando de una estaca que esta sobre la barranca de dicha laguna lamisma que es tercera y ultima magonera del sitio que se medió para Santiago Gonzales y Sello Cuarto, Una Cuartilla.

Para el bienio de 1832 y 1833, 34 y 1835.

GARCIA.

Primera de esta medida. De alli al Sur cuarenta y cinco grados viste con la linea del y á citado Gonzales á Docientas cuerenta varas está una mata nombrada de Artiaga donde esta una estaca de la que al; Este a dos veras de distancia está un palo blanco con una marca de una letra—a y tiene sus pulgadas de dranietro. De alli siguiendo la misma linia al Sur cuarenta y cinco grados veste siete mil novicientas varas hasta una estaca que está cu el llano la que sirve de segunda majoriera para ambos dos medidas. De alli al norte cuerenta y cinco grados oeste con la linea baja de Faustino Alvarado siete mil seis cientas varas a ma estaca que este en el llano que es tercera majonera de esta medida, y dela del siladò albarado y de alli al norte cuerenta y cinco grados Este cinco mil Siente cuerenta varas donde sepuso ma setaca sobre la barranca de dicha laguna para la cuarta y ultima majoriera de esta medida: y de alli siguiendo las vueltas de la Laguna hasta el punta de comensar se completo ma area de cuarenta y seis milliones de varas cuadrados higual á un sitio de tierra de Agostadero por estar á lo menos en su mitad ocupado de balnas sal-

dadas y carecer al mismo tiempo de maderas y agua dulce. Surido su configuracion loque representa el mapa que per duplicado accompano á V. Santiago Kerr.

Probeido del Comisionado.

Librese al presentante titulo de propiedad para que al medio de el posea y disfrute el terreno que pide con arreglo a las leyes: Poreste auto asi probeo mando y firmo con dos testigos de asistencia en esta dicha Villa de Guadalupe Victoria á los once das del mes de Abril del ano demil octrocientos treinta y cinco. Lo que sertifico. Fernando de Leon. De asistencia, Francisco de Cardenas. De asistencia, Bonifacio Rodriguez.

Titulo de Posecion.

Fernando de Leon, Comisionado per el Supremo Gobierno del Estado de Coahuila y Texas, para el repartimiento y posecion de tierras valdias a los colonos intraducidos por el Empresario Cuidadano Martin de Leon a virtud de su primera contrata con el consentimiento y aprobacion del Excellentissimo Senor Vise Presidente de la Republica communicada por el secretario de relaciones al Excellentissimo Senor Gobernador del Estado y pasada en dies de marzo de mil octrocientos treinta y dos al Senor Gefe Politico de este departimiento y á los que nade introducir á virtud deser segunda contrata entre el Rio de La Vaca y el Arroyo del Coleto. Por cuanto Juan cano casado y confamilia es uno de los colonas comprendidos en las contratas de dicho empresario y tiene las calidades que demanda la ley de colonizacion de veinte y cuatro de marzo de mil octrocientos veinte y cinco a las instrucciones de comisionados defecha cuatro de Septiembre de mil octrocientos veinte y siete y segun el informe que ha dado el dicho Ciudadano Empresario internio. En el nombre del Estado le consedo y meto en posecion efectiba y personal de me citio de tierra que es el mismo que solicita y cugos Linderos estan demarcados en el mapa y notas de medidas presentadas per el agmirensor Ciudadano Santiago Kerr como debé en este espediente dicho terreno es de agostadero segun su situacion su localidad conforme á lo que deberá pagar al Estado la cantidad de treinta pesos lo que per via de reconocimiento está marcada con el articulo veinte y dos de la indicada. Ley de colonozacion bajo las penas atli establecidas quedando en tenido que dentro de me ano nade construir majoneras de cal y canto arcada argulo de terreno. Que lo hade ocupar y cultivar segun lo dispuesto en la referida ley. Que cumplira es erupulosamente con toda lo q. en ella se ordena, y que jamas lopasará a manos muertas. Por tanto usando de las facultades que mi con consedidas por la ley é instrucciones consiguentes espido el presente titulo y mando se signe testimonio de el y si le entregen al reittresado para que posea y disfrute

el terreno que se le ha consedido el, sus hijos, herederos y sucesores ó quien de el ó de ellos direcho hubiere ó accion representare por ser asi la voluntadad del Estado. Estado en la Villa de Guadalupe Victoria a los ouse dias del mes de Abril del ano de mil octrocientos treinta y cinco firmado per mi con los testigos demi asistencia conforme a la ley. Fernando de Leon. De asistencia, Francisco de Cardenas. De asistencia, Bonafacio Rodriguez.

Concuerda con su original q. queda en el archibo de esta colonia de donde lomande sacar hey dia de su entrega en cuatro fajas utiles laprimera y ultima en papel de sello segundo y vestantes en el de sello cuarto y a su confrontacion y correcion se hayaron presentes de testigos instrumentales los ciudadanos Ysidro Benavides, Felis de Leon y Luciano Navarro a mas de las de mi asistencia con quienes actuo en la forma de derecho certifico.

FERNANDO DE LEON.

De assistencia,
FRANCISCO DE CARDENAS.
De assistencia,
BONAFACIO RODRIGUEZ.

The following plat is attached to the lower sheet of this testimonio, and appears in the record between the words "y" and "aprobacion," on the seventh and six lines of page 102, counting from the bottom.

JAMES LOVE,
Clerk.

[For plat, see original, p. 105.]

Together with a translation thereof, as follows:

To the Commissioner.

I, Juan Cano, being a married man, and having a family before you in the best form the law permits, present myself and declare that, being as in fact I am one of the colonists admitted by the Empresario, and being without a title to the land that corresponds to me as such a settler, I make application to you, that exercising the power granted you by the law, you may be pleased to authorize the survey, and extend me the title to one site of land situated on the west bank of Matagorda Lagoon (Bay?), adjoining on the southeast with the site that was surveyed for Santiago Gonzales, the said land being vacant, whereby I shall receive justice.

JUAN CANO.

GUADALUPE VICTORIA, March 23d, 1835.

GUADALUPE VICTORIA, March 23d, 1835.

Pass the above petition to Placido Venavides, for him to inform in continuation whether what is set forth by the person interested be the truth, and return the same. LEON.

To the Commissioner.

In attention to your foregoing decree it is my duty to inform you that the petitioner is one of the colonists, admitted by me for settling the lands marked out by the executive department of the state to my predecessor, and possesses the qualifications required by law, for which reason I consider him entitled to the favor he requests, and because the land he solicits is vacant, and he does not injure any corporation or third person, this being all I have to communicate to you on this subject.

PLACIDO BENAVIDES.

GUADALUPE VICTORIA, March 24th, 1835.

To Santiago Kerr.

GUADALUPE VICTORIA, March 24th, 1835.

Surveyor to execute scientifically the survey requested, and note down the same in continuation, and return this document.

LEON.

To the Commissioner.

The land that has been surveyed for Juan Cano, is situated on the western bank of the mother lake (Laguna Madre) of Matagorda, commencing at a stake that stands upon the deep break of said lake, the same being the third and last landmark of the sites that was surveyed for Santiago Gonzales, and first of this survey, thence south forty-five degrees west, with the line of the aforementioned Gonzales, at two hundred and forty-five varas there is a small mound, called Artealgas mound, where there is a stake, from which to the east, at a distance of two varas, there is a palo blanco, with a mark of a letter A, and it is six inches in diameter; thence following the same line south forty-five degrees west, seven thousand nine hundred varas, to a stake in the plain that serves as the second landmark for both surveys, thence north forty-five degrees west, with the lower line of Faustino Alvarado, seven thousand six hundred varas, to a stake in the plain, which is the third landmark of this survey and of that of the said Alvarado, and thence north forty-five degrees east, five thousand one hundred and forty varas, where a stake was driven in the deep break of said lagoon, for the fourth and last landmark of this survey, and thence following the bends of the lagoon to the place of beginning, completing an area of forty-six millions of square varas, equal to one sitio of grazing land, as at least one-half of said area is filled with salt bays and lagoons, and is at the same time destitute of timber and fresh water, its shape being that represented in the map, of which I herewith accompany you a duplicate.

SANTIAGO KERR.

Title shall issue to the applicant, that by means thereof he may possess and enjoy the land he requests according to law; by this act I so provide, order, and sign, together with my two assisting witnesses, in this the said town of Guadalupe Victoria, on the 11th April, 1835, which I hereby certify.

FERNANDO DE LEON.

Commissioned by the Executive Department of the State of Coahuila and Texas, for distributing and giving possession of vacant lands to the colonists introduced by the Empresario Martin de Leon, by virtue of his first contract, with the consent and approbation of his excellency the Vice-President of the Republic, communicated by the Secretary of Relations to his Excellency, the Governor of the State, and passed on the 10th of March to the political chief of this department, and to those he is to introduce by virtue of his second contract, between the river Lavaca and Coleto Creek.

Whereas Juan Cano, a married man, and having a family, is one of the colonists comprised in the contracts of said Empresario, and possesses the qualifications required by the colonization law of the 24th March, 1825, and commissioners' instructions of the 4th September, 1827, and according to information given to said Empresario *ad interim*. In the name of the State I hereby grant him and put him in effectual and actual possession of one sitio of land, being the same he solicits, and whose boundaries are marked out in the map and notes of survey presented by Santiago Kerr, surveyor, as appears in this dispatch. Said land, according to its locality and situation, is grazing land, agreeably to which he must pay the State the sum of thirty dollars, marked out as acknowledgment in the 22d article of the aforementioned colonization law, under the penalties therein established; it being understood that within one year he must construct landmarks of stone and lime on each angle of the land, that he must occupy and cultivate the same according to the provision of the aforementioned law, and that he shall scrupulously fulfil all that is therein ordained, and that he shall never transfer it in mortmain; therefore exercising the powers granted me by the law and consequent instructions, I hereby issue the present title, and order an attested copy thereof to be taken and delivered to the person interested, that he may possess and enjoy the land that has been granted him, himself, his children, heirs, and successors, whoever from him or them should possess a right or represent an action, for such is the will of the State.

Given in the town of Guadalupe Victoria, on the 11th of April, 1835. Signed by myself, together with my two assisting witnesses, according to law. FERNANDO DE LEON.

Assisting witness,
FRANCISCO DE CARDENAS.
Assisting witness,
BONIFACIO RODRIGUEZ.

Bill of Exceptions, continued.

Together with the agreement of counsel in this case numbered (3), and, by agreement of parties, said original testimonio shall be sent up with the record for the inspection of the Supreme Court of the United States.

To the admission of which said original and translation the defendants by their counsel objected, on the grounds—

1st. That the said title had not been recorded in the county where the land is situated.

2d. It had not been recorded or deposited in the General Land Office of the State of Texas.

3d. It had been interpolated, changed, or altered, by the insertion of the map or plat of the land attached to said document, and not on stamped paper, and constitutes no part of the original documents, which objections of defendants' counsel were overruled by the court, and the said original and translation were read in evidence to the jury, to which ruling of the court the defendants by their counsel excepted.

Bill of Exceptions, continued.

It was agreed by the counsel, and is now made part of the record by the court, that in the bills of exceptions in this cause the captions of depositions and certificates of the officers shall be omitted, except where made the subject of a special exception, and that each answer of the witness shall follow its appointed interrogatory in making up the record.

Bill of Exceptions, continued.

Plaintiffs then read a deed from Juan Cano to Leonardo Manse, bearing date 28th day of May, 1835, conveying the said league of land granted to Juan Cano.

Bill of Exceptions, continued.

Plaintiffs then read the deposition of Guy H. Bell, taken in the parish of St. Landry, Louisiana, as follows:

Guy H. Bell's Deposition.

That he has examined a deed on file in the office of Henry L. Garland, a notary public in the parish of St. Landry, State of Louisiana, successor to Pierre Labeche, deceased, which deed purports to be a sale of certain tracts of land situated in Texas, from Leonardo Manse, to Peter W. Grayson, dated 6th April, A. D. 1836. And passed before the said Pierre Labeche, as notary public, a certified copy of

which deed is paraphed by him, the deponent, who further deposeth: That he was well acquainted with the said Pierre Labeche, the said notary, and with his handwriting, and that the signature, "Labeche, notary public," to said deed, is genuine, and in the proper handwriting of said Pierre Labeche. That he was well acquainted with John Simons, one of the witnesses to said deed; that he believes the signature to be genuine, and in the proper handwriting of said John Simons; that he is not acquainted with the handwriting of any of the other parties, or witnesses to said deed; that said Pierre Labeche is dead, and that he believes that Leonardo Manse and John Simons are both dead; that he knows nothing of Peter W. Grayson, or Henry Bruse, or where they reside, if alive.

G. H. BELL.

Bill of Exceptions, continued.

Plaintiffs offered in evidence the certified transcript of deed from Leonardo Manse to Peter W. Grayson, referred to and included in said deposition of Guy H. Bell, with the certificates and agreement of counsel thereon, as follows:

Deed from Leonardo Manse, to P. W. Grayson.

Ne varieter. Henry Garland, notary public, State of Louisiana, Parish of St. Landry:

Be it known that this day, before me, Pierre Labeche, notary public in and for the parish of St. Landry, duly commissioned and sworn, personally came and appeared Leonardo Manse, a citizen of the Republic of Mexico, who declares that for and in consideration of the sum of eleven thousand dollars, to him in hand paid, the receipt whereof is hereby acknowledged, he does by these presents grant, bargain, and sell to Peter W. Grayson, a citizen of Texas, late a portion of the said Republic of Mexico, his heirs and assigns, he here present and accepting, the following tracts or parcels of land, lying and being in the said Texas, viz., one league or sitio of land granted to him, the said Leonardo, as a colonist, or settler in the colony of Martin De Leon, by deed or grant executed on the 26th day of September, 1834, the said league or sitio of land lying on the west bank of the river Lavaca, immediately above and adjoining the league granted to Juan Fernandez. Also, one league or sitio of land purchased by said Leonardo of Carlos Laro, to whom the same was granted, as a colonist or settler, on the 18th day of February, 1833, the same lying and being on the river Lavaca, bounded on the lower side by the league of Sylvester De Leon, and on the upper by the league of Juan Fernandez. Also, one league or sitio of land purchased by the said Leonardo of Manuel Lopez, to whom the same was granted as a colonist or settler on the 9th day of April, 1835,

the same lying and being on the lower margin of the Green Lake (Lagune Verde). Also, one league or sitio of land purchased by said Leonardo of Enrique Renden, to whom the same was granted as a colonist or settler on the 8th day of April, 1835, the same lying and being on the east margin of the lakes or lagoons, into which the river Gaudaloupe empties itself, and adjoining on the lower side the league granted to Manuel Lopez.

Also, one league or sitio of land, purchased by said Leonardo of Jose Miguel Cortez, to whom the same was granted as a settler or a colonist on the 8th day of April, 1835, the same lying and being on the east margin of the lagoon above mentioned, and adjoining, on the lower side, the league granted to Enrique Rinden. Also, one league or sitio of land purchased by said Leonardo of Pedro Miranda, to whom the same was granted as a colonist on the 8th day of April, 1835, the same being and lying on the east margin of the lagoons mentioned above, and adjoining, on the lower side, the league granted to Jose Miguel Cortez. Also, one league or sitio of land purchased by said Leonardo of Miguel Castetto, to whom the same was granted as a colonist, on the 8th day of April, 1835, the same lying and being on the east margin of the lagoons aforesaid, and adjoining on the lower side the league of Pedro Miranda. Also, one league or sitio of land purchased by said Leonardo of Jose Felix de la Fuente, to whom the same was granted as a colonist on the 8th day of April, 1835, the same lying and being on the northeast margin of the lagoon, called the Old Mission (la Mission Viega) and adjoining on its lower side the league granted to Miguel Castetto. Also, one league or sitio of land purchased by said Leonardo of Maximo Campos, to whom the same was granted as a colonist on the 31st day of March, 1835, the same lying and being on the east margin of the great lake into which the river Guadaloupe empties itself, and adjoining on its lower side the league granted to Felix de la Fuente. Also, one league or sitio of land purchased by said Leonardo of Eusebia Hidalgo, to whom the same was granted as a colonist on the 8th day of April, 1835, the same lying and being on the east margin of the lake just above mentioned, and adjoining on its lower side the league granted to Maximo Campos. Also, one league or sitio of land purchased by said Leonardo of Basilio Mildonado, to whom the same was granted as a colonist on the 8th day of April, 1835, the same adjoining the league granted Eusebio Hidalgo. Also, one league or sitio of land purchased by said Leonardo of Eusta qui Cantre, to whom the same was granted as a colonist on the 8th day of April, 1835, the same adjoining the league granted to Basilio Mildonado. Also, one league or sitio of land purchased by Sr. Leonardo of Pedro Garcia, to whom the same was granted as a colonist on the 10th day of April, 1835, the same adjoining the league granted to Eusta qui Cantre. Also, one league or sitio of land purchased by said Leonardo purchased of Clito Garcia, to whom the same was granted as a colonist the 10th

day of April, 1835, the same adjoining the league granted to Pedro Garcia. Also, one league or sitio of land purchased by said Leonardo of Faustino Albarado, to whom the same was granted as a colonist on the 10th day of April, 1835, the same adjoining the league granted to Clito Garcia. Also, one league or sitio of land purchased by said Leonardo of Santiago Gonzales, to whom the same was granted as a colonist on the 11th day of April, 1835, the same adjoining the league granted to Faustino Albarado. Also, one *one* league or sitio of land purchased by said Leonardo of Juan Cano, to whom the same was granted as a colonist on the 11th day of April, 1835, the same lying and being on the west margin of the lagoon of Matagorda, and adjoining the league granted to Santiago Gonzales. Also, one league or sitio of land purchased by said Leonardo of Benito Morales, to whom the same was granted as a colonist on the 11th day of April, 1835, the same lying and being on the west margin of the lagoon of Matagorda, and adjoining the league granted to Juan Cano. All the above lands, situate within the colony granted to Martin de Leon in the year , the official copies of the titles to which, in the said Leonardo Manse, accompany this instrument, save a particular conveyance from Carlos Laro to him the said Leonardo, in room of which he now presents the official copy of the grant or concession to said Laro, as evidence of title, with a letter of instruction to his agent or attorney in Texas, to procure from said Laro, if he has not already done it, a legal conveyance of his league, so as to perfect the title of said Grayson. All which accompanying copies of grants and instruments of sale are referred to in this instrument for greater certainty as to the description of the lands conveyed by them.

To have and to hold the said several tracts of land to the said Peter W. Grayson, his heirs and assigns, to their proper use and behoof forever. The said Leonardo hereby renouncing all dominion, right, and title to the same, in favor of the said Grayson and his successors; and the said Leonardo renounces all laws in his favor, including that of "rectro" or "rectrato," and declares that to this instrument he intends no other than a literal interpretation, executing it as a full and perfect deed of sale, without reserve or right of reclamation. The said Grayson hereby binding himself to pay whatever fees may yet be due to the government on said lands, and to comply with whatever obligations may be enjoined by the law of the 24th of March, 1825.

Done and passed in my office, in the town of Opelousas, in presence of John Simons and Henry Bruse, competent witnesses, who have signed these presents with the said contracting parties.

"Ne varieter." HENRY L. GARLAND,
Notary Public.

And me, the said notary public, after reading, this tenth day of April, Anno Domini eighteen hundred and thirty-six.

P. W. GRAYSON.
L. MANSE.

Witnesses:
JOHN SIMONS,
HENRY BRUSE.

LABECHE,
Notary Public.

State of Louisiana, Parish of St. Landry.

I, Henry L. Garland, notary public in and for the parish of St. Landry aforesaid, and successor in office to Pierre Labeche, named in the above act, do certify, that the foregoing four pages, paraphed ne varieter by me, contain a true copy of the original record made by said Pierre Labeche, and legally in my office, as notary aforesaid and successor to said Pierre Labeche, and that I am the keeper of said record.

Given under my hand and private seal this ninth day of May, 1851, at Opelousas.

[L. S.]

HENRY L. GARLAND,
Notary Public.

State of Louisiana, Parish of St. Landry.

I, John H. Overton, presiding judge of the 15th judicial district of the State of Louisiana, which includes the parish of St. Landry, and presiding judge of the District Court for said parish of St. Landry, do certify, that the foregoing certificate and attestation, by Henry L. Garland, notary public of the parish of St. Landry, is in due form, and by the proper officer.

Given under my hand, this 13th day of May, A.D. 1851.

J. H. OVERTON,
Judge 15th Judicial District.

State of Louisiana, Parish of St. Landry.

I, A. Garrigues, clerk of the District Court of the 15th judicial district in and for the parish of St. Landry, do hereby certify, that the said John H. Overton, who signed the preceding certificate, is duly commissioned and qualified as presiding judge therein stated.

Given under my official signature and seal this 13th day of May, A.D. 1851.

A. GARRIGUES,
Clerk.

Copy referred to in my deposition as paraphed by me.
Attest, GUY H. BELL.

Agreement referred to.

I admit the sufficiency to the certificates to the foregoing deed is conformable to the Act of Congress, March 27th, 1804, waiving want of notary's seal, &c., but do not admit that the deed could be certified under that law.

GEO. W. PASCHAL.

May 31, 1851.

ALLEN & HALE,
Attorneys for Reuss & Bullerwald.

To the admission of which said transcript in evidence, defendant, by his counsel, objected, on the ground that it was secondary evidence, and that plaintiffs had not laid the legal grounds for its admission, and that Manse was an alien, and an alien enemy at the time of its execution. Which objections were overruled by the court, and the said deed was read in evidence to the jury. And the defendant Cook, by his counsel, thereupon excepted to said ruling of the court.

Bill of Exceptions, continued.

The Will of Peter W. Grayson.

Plaintiffs moved the last will and testament of Peter W. Grayson, as follows, together with the due probate of said will in the County Court of Galveston County, and the issuance of letters testamentary to his executors, Gail Borden, Jr., and John P. Borden, and a decree of the Galveston District Court in favor of Albert T. Burnley and Levi Jones, directing said executors to convey to said Burnley and Jones, among other lands, the undivided three-fourths of the lands purchased as aforesaid by said Grayson of said Manse, and devised to the said Burnley and Jones in the will of said Grayson. And plaintiffs read in evidence a deed from said executors to said Jones and Burnley, as follows:

State of Texas, County of Galveston.

In the matter of the last Will and Testament of Peter W. Grayson, deceased.

Will.

I, Peter W. Grayson, of the Republic of Texas, feeling at the present moment particularly the uncertainty of life, do make this my last will and testament. First, I give and bequeath to my three nephews, Fred. W. Grayson, John C. Grayson, and Alfred Grayson, and to my niece, Mary E. Breckenridge, now living in the United States, to be divided equally among them, all that I may be worth in lands or

other property, after the payment of my just debts, and the following legacies, namely: To Doctor Levi Jones, of Texas, and Albert T. Burnley, of Kentucky, I give and bequeath all the lands held under title made to me, or secured to be conveyed to me, by bond or otherwise, upon purchases made on our joint account in the years 1836 and 1837: said lands may be ascertained by writings under my hand executed to the aforesaid Burnley; also one league of land lying on the east side of the West Bernard, being one of eleven leagues purchased by me of Miguel Muldoon, and sold to the said Burnley, I give and bequeath to him: meaning by this form to put them in possession of the legal title to the same. With respect to the lands hereby bequeathed to the said Jones and Burnley I make this exception, and direct that a certain portion of them be conveyed by them to William Lambeth, of New Orleans, or any one he may appoint to receive title to the same, their quality and location to be ascertained by a writing which I have made to the said Lambeth, obligating myself to convey them to him. Item: I direct the executors of this my last will to convey to any one who may be chosen by Robt. W. Gilmer, of Virginia, to receive as the title to one league of land on Carancalva Bayou, granted to me as a colonist, I having sold the same to the said Gilmer and given my obligation for a conveyance. I give and bequeath to the heirs of Josiah H. Bell, deceased, a certain league of land lying on the West Bernard, and adjoining the one herein bequeathed to the aforementioned Jones and Burnley, the same having been purchased by me of the aforesaid M. Muldoon. Item: I give and bequeath to my friend Richard Lemmon, of Baltimore, five thousand dollars, in testimony of the gratitude I feel for his fatherly care of the children of my deceased brother. This sum I desire may be raised as soon as it can, without making too great a sacrifice, out of any of my lands. Lastly, I hereby appoint my friends, Gail Borden, Jr., James Love, John Borden, and Oscar Farish, executors of this my last will and testament. In witness whereof I hereunto set my hand and affix my seal, this 9th day of June, 1838.

P. W. GRAYSON. [L. S.]

Witnesses,
OSCAR FARISH,
JOHN D. GROESBECK,
R. H. CHINN.

Republic of Texas, County of Galveston.

Proof.

Personally appeared before me, R. D. Johnson, chief justice in and for said county, Oscar Farish, who being duly sworn saith, that the annexed will is in the handwriting of Peter W. Grayson, dec'd, with the exception of the names of those who signed as witnesses;

and that he saw the said Grayson sign the same, as his last will and testament. At the same time appeared Samuel M. Williams, Thomas F. McKinney, James Welsh, Levi Jones, who being duly sworn, saith, that they are well acquainted with the handwriting of Peter W. Grayson, and believe the annexed will to be written in his own handwriting and entirely by himself, except the names of those who signed as witnesses.

OSCAR FARISH,
SAML. M. WILLIAMS,
THOMAS F. McKINNEY,
LEVI JONES,
JAMES WELSH.

Sworn to and subscribed this 26th April, 1840.

R. D. JOHNSON,
Judge of Probates, Galveston County.

In Office, April 24th, 1840.

This day came on to be heard the petition of Gail Borden, Jr., and John P. Borden, praying that a time and place may be designated, so that the will of Peter W. Grayson, deceased, may be probated and that letters testamentary may issue to said petitioners, &c. And that said will having been proven by Oscar Farish, one of the witnesses to the same; and the handwriting of said Grayson having been proven by Samuel M. Williams, Thomas F. McKinney, Levi Jones, and James Welsh, likewise: It is decreed, ordered, and ordained, that said will be admitted to record, and that letters testamentary issue to petitioners.

R. D. JOHNSON,
Probate Judge.

The State of Texas, County of Galveston.

I, Oscar Farish, clerk of the County Court of Galveston county, do hereby certify that this sheet contains a true copy, from the records of said court, of the last will and testament of Peter W. Grayson, deceased, the proof thereof, and the decree of the court probating the same, and ordering its record.

In witness whereof, I hereto subscribe my name, and affix [SEAL.] the seal of said County Court, this 13th day of May, A.D. 1838.

OSCAR FARISH,
Clerk.

Deed from Executors of Grayson to Burnley & Jones.

Republic of Texas, Galveston County.

This indenture, made and entered into this twenty-second day of

May, one thousand eight hundred and forty-four, between Gail Borden, Jr., and John P. Borden, executors of the last will of Peter W. Grayson, deceased, of the one part, and Levi Jones and Albert T. Burnley, of the other part, witnesseth: That whereas, by a decree of the District Court for the county of Galveston aforesaid, at its Fall term, for the year 1843, it was ordered that the parties of the first part convey to Levi Jones and Albert T. Burnley, parties of the second part, certain lands purchased by said Peter W. Grayson for them, and transferred by various deeds to him the said Grayson; now therefore, in obedience to said decree, and in consideration of the sum of five dollars, the receipt whereof is hereby acknowledged, the said Gail Borden, Jr., and John P. Borden, executors as aforesaid, parties of the first part, have bargained, sold, and released, and by these presents do bargain, sell, and release unto the said Levi Jones and Albert T. Burnley, all the lands in the Republic of Texas purchased by Peter W. Grayson of Leonardo Manse, William Arrington, Valentine Garcia, Diego Garcia, Samuel Williams, José Coffin, and Sarah, his wife, and Thomas Jackson and wife, also a certain league of land lying on the east side of the West Bernard, designated on the map as number one (1); the same being one of eleven leagues purchased by said Grayson of Miguel Muldoon, a more full description of all which will be found in the various deeds recorded in the clerk's office of the several counties where the lands lie, made and executed by the several persons hereinbefore mentioned to said Grayson, excepting, however, one equal undivided fourth part of the lands purchased as aforesaid from Leonardo Manse, and which said fourth part is, by the will of said Grayson, to be conveyed to William M. Lambeth or his assigns, together with all and singular the hereditaments and appurtenances unto the same belonging or in any wise appertaining, for the considerations aforementioned.

In testimony whereof, the said Gail Borden, Jr., and John P. Borden have hereunto set their hands and affixed their seals the date above written.

G. BORDEN, JR., [SEAL.]
JOHN P. BORDEN. [SEAL.]

Republic of Texas, County of Galveston.

Before me, John S. Jones, chief justice of said county, this day personally came and appeared Gail Borden and John P. Borden, the parties to a certain deed on the other side hereof written, and bearing date the second day of May, one thousand eight hundred and forty-four, who acknowledged and declared that he signed, sealed, and allows the same as his act, and *and* as one of the executors of Peter W. Grayson, for the purposes therein set forth and contained.

[SEAL.] To certify which and make authentic, I have hereunto set my name and seal this the 24th day of August, A. D. 1844.

JOHN S. JONES,
Chief Justice.

Filed for record October 14th, A. D. 1845.

JAMES INGRAHAM,
Clerk V. C.

I certify that the within deed is duly recorded in the records of Victoria county, in Book 2, folio 228, this 14th day of October, A. D. 1845.

JAMES INGRAHAM,
Clerk and Recorder Victoria County.

Filed for record Sept. 4th, A. D. 1848.

JOHN W. B. McFARLANE,
Clerk.

I certify that the within deed is duly recorded in the records of Ref. county, in Book C., folio P. 190, 191, this Sept. 4th, A. D. 1848.

JOHN W. B. McFARLANE,
Clerk Ref. Co.

State of Texas, County of Goliad.

I, J. L. McKinney, county clerk in and for said county, do certify, that on the 23d day of October, 1848, at 2 o'clock P.M., I recorded the within instrument of writing on pages 68 and 69 in book B.

[L. S.] To certify which, I hereto set my hand and official seal at my office, the day and date above written.

J. L. McKINNEY,
County Clerk, Goliad County.
By his deputy, J. F. McKINNEY.

State of Texas, County of Calhoun.

I, William P. Milby, county clerk of the County Court of Calhoun county, hereby certify that the deed of conveyance from Gail Borden, Jr., and John P. Borden, executors of P. W. Grayson, to Levi Jones and A. T. Burnley, was filed in my office for record on the 8th day of January, A.D. 1849, and the same is duly recorded in Book A., Folio 292, 293.

[L. S.] Given under my hand and seal of the County Court at my office in Lavacca, the day and year above written.

WILLIAM P. MILBY,
Clerk County Court.

State of Texas, County of Jackson.

I, George R. Billups, clerk and recorder for county aforesaid, do hereby certify that the within deed was filed in my office on the 12th day of February, 1849, and recorded in book C., pages 249 and 250, on the 14th of February, 1849.

[L. S.] Given under my hand and seal of office the day and date above written.

GEORGE R. BILLUPS,
Clerk County Court, Jackson County.

The State of Texas, County of Wharton.

Recorder's office: Filed for record, February 24th, A.D. 1849, 2 o'clock P.M., and recorded in book A., records of deeds, pages 116, 117, and 118, on the 28th day of February, 1849, 12 o'clock M.

[L. S.] To certify which, I hereunto set my hand and seal of office the day and date last above written.

G. EAGAN,
Clerk and Recorder of Wharton County.

March 19th. Filed in the County Clerk's office, at Gonzales, for record.

BENJAMIN B. PECK,
County Clerk, G. C.

Recorded in county record D., page 200, 201, the same day.

BENJAMIN B. PECK,
County Clerk, G. C.

Bill of Exceptions, continued.

Plaintiffs also offered in evidence the following writing, and proved *and proved* the same, by the evidence of James Love, to be in the handwriting of Peter W. Grayson, deceased, and also the signature thereto.

Deed and Note of Hand. P. W. Grayson to W. M. Lambeth.

I, the undersigned, having received, on the 2d day of April last, from William M. Lambeth, of New Orleans, the sum of five thousand five hundred dollars, under an agreement with him, said Lambeth, to invest the same in lands in Texas upon our joint account, one-half of said sum being advanced by way of loan to me by said Lambeth; and I in pursuance of said agreement, having invested the said sum of five thousand five hundred dollars in a purchase made by me of a certain Leonardo Manse, a citizen of Texas, of eighteen leagues of land for and in consideration of the sum of eleven thousand dollars; the said land lying and being in De Leon's colony, and deeded to me on the 6th day of April last. Now this article witnesseth, that I, the undersigned, hereby bind myself, my heirs, &c., to hold for the use and benefit of the said William M. Lambeth, one-fourth part of said eighteen leagues of land, the said part to be determined by the consideration of quantity and quality jointly upon a division fairly to be made by disinterested persons; and to convey the same

to him, the said William M. Lambeth, at any time he shall apply to me for the conveyance.

Witness my hand and seal this 29th day of June, 1836.

P. W. GRAYSON. [L. S.]

To the admission of which said writing, the said defendant Cook, by his counsel, objected, for the following reasons:

First. Said writing was not executed in conformity to the laws of Texas, prescribing the mode and requisites for conveying real estate therein.

Second. It contains no interest in lands sufficient to maintain an action of trespass to try title or ejectment.

But the court overruled the objections, and the said writing was read in evidence to the jury. To which ruling of the court the defendant Cook by his counsel excepted.

Bill of Exceptions, continued.

Plaintiffs then read in evidence a deed from Wm. M. Lambeth to Levi Jones, as follows:

Deed from Lambeth to Levi Jones.

State of Louisiana, City of New Orleans.

Be it known that this day before me, William Christy, a notary public, in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and qualified, personally came and appeared William M. Lambeth, of this city, widower, who declared that, for the consideration hereinafter expressed, he does by these presents grant, bargain, sell, and convey unto Dr. Levi Jones, of Galveston, State of Texas, present accepting, and purchasing for himself, his heirs, and assigns, all the right, title, interest, claim, and demand of every kind and nature whatsoever, which he, the said appearer, has in and to the one undivided fourth of eighteen leagues of land, situate in the Leon colony, State of Texas aforesaid; and the respective tracts are described as follows, to wit:

One league, granted to Leonardo Manse by the Mexican government, on the 26th day of September, 1834; one league, granted to the said Manse by the Mexican government, on the 26th September, 1834, and situated on the left bank of the river Lavaca, immediately above and joining the league granted to Juan Fernandez; also one league purchased by said Manse of Charles Laro, to whom it was granted by said government, on the 18th of February, 1833, and situated on said river between the leagues granted to said Fernandez and Sylvester Leon. Also one league, purchased by said Manse of Manuel Lopez, to whom it was granted by said government, on the 9th April, 1835. Also one league, granted to Enrique Rendin, on

the 8th April, 1835, situated on the east margin of the lake into which the said Gaudaloupe empties itself, adjoining on the lower side the league granted to the said Lopez. Also one league, granted to Jose Miguel Cortez, on the 8th April, 1835, situated on the east side of said lake, adjoining, on the lower side, the league granted to Randin. Also one league, granted to Pedro Miranda, on the 8th April, 1835, and situated on the east side of said lake, and adjoining on the lower side the league granted to said Cortez. Also one league, granted to Miguel Castillo, on the 8th April, 1835, situated on the east side of said lake, and adjoining *and adjoining*, on the lower side, the league granted to said Miranda. Also one league, granted to Jose Felix de la Fuente, on the 8th April, 1835, situated on the east side of the lake, called the Old Mission, and adjoining, on the lower side, the league granted to said Castillo. Also one league, granted to Maximo Campus, on the 31st March, 1835, situated on the east side of said lake, into which the said river Gaudaloupe empties itself, and adjoining on the lower side the league granted to the said Felix de la Fuente. Also one league, granted to Enuho Hidalgo, on the 8th April, 1835, situated on the east side of said lake, and adjoining on the lower side the league granted to the said Campus. Also one league, granted to Basilio Mildonado, on the 8th April, 1835, and adjoining the league granted to said Hidalgo. Also one league, granted to Eustaqui Cantor, on the 8th April, 1835, adjoining the league granted to Mildonado. Also one league granted to Clito Garcia, on the 10th April, 1835, and adjoining the league granted to said Pedro Garcia. Also one league, granted to Fenleno Alvarado, on the 10th April, 1835, and adjoining the league granted to said Clito Garcia. Also one league, granted to Santiago Gonzales, on the 11th April, 1835, and adjoining the league granted to said Faulino Alvarado. Also one league, granted to Juan Cano, on the 11th April, 1835, situated on the west side of Matagorda Lake, and adjoining the league granted to said Gonzales. Also one league, granted to Benito Morales, on the 11th April, 1835, situated on the west side of said lake, and adjoining the league granted to said Cano.

The interest in the said lands was acquired by the said Lambeth by a decree of the District Court of Galveston county, State of Texas aforesaid, in a suit wherein the said Lambeth was plaintiff, and Gail Borden and John P. Borden, executors of the late Peter W. Grayson, were defendants; which decree has been carried fully into effect by a formal deed from the said executors to the said Lambeth, dated on the first day of September last past, and by them acknowledged before the clerk of the county court of the said county of Galveston, on the said first day of September, 1847, to have and to hold the said interest in and to the said lands, unto the said purchaser, his heirs, and assigns, to their proper use and behoof forever; it being fully understood by and between the said parties, that this conveyance is to be nothing more than a quitclaim deed, the said vendor giving no other guarantee than against himself, his heirs, and assigns. This sale is

made for and in consideration of the sum of six thousand dollars ($6000), and interest, four thousand dollars of which has been paid in ready money; and for the balance the said purchaser has given a promissory note for the sum of two thousand dollars, drawn by R. A. Porter to the vendee of the said Lambeth, dated the 26th day of May, 1846, and made payable two years after the first day of July after date, and bearing interest at the rate of six per cent. per annum from the first day of July, 1846, the receipt of which note and ready money is hereby acknowledged by the said Lambeth; the said note having been first paraphed, *ne varieter*, by me, said notary, to identify it with this act. And in order to secure the punctual payment of said note and interest, the said purchaser hereby specially mortgages and hypothecates the said lands to his said vendee, promising and binding himself not to alienate, deteriorate, or incumber the same to the prejudice of this mortgage. And the said Jones moreover obligates and binds himself to pay the said note at maturity, in case the said Porter should do so; it being well understood and agreed that the possession of the said note, after maturity, by the said Jones, shall be sufficient evidence of the payment thereof, and shall be sufficient authority for the proper officer to cancel the aforesaid mortgage, in whatever office it may be.

Thus done and passed in duplicate, in my office, at the said city of New Orleans, in the presence of Henry Rareshide and David A. Beckel, witnesses of lawful age and domiciliated in said city, who hereunto sign their names, together with the said appearers, and me, said notary, on this 28th day of March, eighteen hundred and forty-eight.

WILLIAM M. LAMBETH,
LEVI JONES.

H. RARESHIDE,
D. A. BECKEL.

WILLIAM CHRISTY, [SEAL.]
Notary Public.

State of Louisiana, Parish of New Orleans.

Before me, Albert Childe Ainsworth, commissioner for the State of Texas, to act in the State of Louisiana, duly appointed and sworn, personally appeared William M. Lambeth, of New Orleans, and Levi Jones, of Texas, both to me intimately known, and they respectively acknowledged, that on the 28th March, 1848, they had signed and delivered before Wm. Christy, and H. Rareshide and D. A. Beckel, notary and witnesses, the instrument above and foregoing, as their voluntary acts and deeds, for the purposes and the considerations therein entertained.

In faith whereof I grant these presents at New Orleans, under my signature and seal of office, this 6th day of April, 1848.

[L. S.]

A. C. AINSWORTH,
Commissioner.

State of Texas, Calhoun County.

I, J. C. Pendleton, deputy for Isaac Brugh, clerk of the County Court of the county and State aforesaid, do hereby certify, that the within deed of conveyance from William M. Lambeth to Levi Jones, was duly filed in my office for record, on the 9th July, 1848, and recorded on the 18th day of said month, at 4 o'clock, P.M., in book A., and commencing on page 317.

Given under my hand and the seal of the County Court, at my office in Lavaca, this 18th day of July, 1848.

[L. S.]

J. C. PENDLETON,
Deputy.

For ISAAC BRUGH,
Clerk for Calhoun Co. Court.

To the introduction of which in evidence the defendant Cook, by his counsel, objected, on the ground that the said purported deed is in fact but a mortgage, which objection was overruled by the court, and the said deed was read in evidence to the jury. And the said defendant by his counsel excepted thereto.

Bill of Exceptions, continued.

Plaintiffs also proved a deed from Levi Jones to Albert T. Burnley, executed 10th day of July, 1848, conveying his interest in the lands devised to them by Peter W. Grayson, deceased, which was conveyed to them by his executors as aforesaid, and specifically including the said league granted to Juan Cano, reserving, however, the undivided one-fourth interest purchased by said Jones of said William M. Lambeth. It was agreed and admitted by the counsel of the parties for the purposes of this trial, that the said undivided one-fourth interest of said William M. Lambeth, and conveyed to said Jones, had been duly conveyed to the plaintiff, Royal A. Porter, on the 5th day of November, 1850, subject to the exceptions hereinbefore taken to the title of Lambeth.

Bill of Exceptions, continued.

The plaintiffs then read in evidence from the deposition of Jose Maria Jesus Cargavahal, taken under examination in presence of plaintiffs' counsel and defendant Cook and his counsel, on the 18th day of January, 1854, as follows:

Cargavahal's Deposition (part of it).

I held the office of surveyor in Martin De Leon's colony, from 1832 up to the time of the Texan revolution. I was well acquainted with Leonardo Manse; he was one of the colonists in De Leon's

colony, and was settled there when I first went to that colony, and had a ranch and a large amount of stock in the colony; he was a native of Spain, but emigrated to Mexico when very young. He became an officer in the Spanish army in Mexico, and joined the cause of independence in 1821, and became by that act a citizen of the American Republic; was afterwards an officer in the Mexican army for some years. Retired from service, and was appointed by the general government an officer in the custom-house in Metamoras, and came thence to De Leon's colony.

Cross-examination.

While I was surveyor in De Leon's colony, my practice was, and the practice was general in making a survey calling for one league of land, for example, if the amount required could not be obtained on one side of a lagoon or stream which happened to be in the way, I would run the line to the water and continue the survey on the opposite side, and not compute the land covered by the water in the area; and if the circumstances of the case permitted the return to be made in one plat, it would be so done; if not, two plats would be made. In surveying lands on navigable streams, such as the Lavaca and Gaudaloupe rivers, our practice was to give front on such stream equal to one-half the depth of the survey; that is, if I gave 1000 varas front, I would run back 2000 varas. This practice prevailed only in fronting on sweet-water courses of importance, and had no effect in the surveys made on the coast fronting on the bays, or on the small streams. If the complement of a survey cannot be obtained on one side of a navigable bay, the lines of the survey could be extended, and the requisite area obtained on the other side, the whole might be one survey. If a survey in De Leon colony had been commenced on one side of a salt bay, eight miles long and four broad, and the requisite area could not have been obtained on one side, the lines might have been continued across the bay, and the complement obtained on the other side. It might have been included in the same survey. The land covered by water would have been comprehended in the grant, but not computed in making up the area of the survey, the full amount of which must be made on land.

Leonardo Manse went, in 1834, to Opelousas, and returned to Metamoras in 1837. He took some eleven or twelve boys to school in Opelousas, and took also a large number of mules and mares belonging to their parents and to himself, for the purpose of paying for their education. He left in De Leon's colony a large amount of stock, servants, and an agent to attend to his business. I do not recollect when he returned to Texas, but have seen him since on the Rio Grande in Texas. He never returned to De Leon's colony to reside, to my knowledge. But on further consideration, I recollect of seeing him in Victoria in 1835, I think about June.

Bill of Exceptions, continued.

Plaintiffs then read in evidence, from the deposition of Edward Linn, taken by the defendants in this suit, on the 6th day of February, 1856, as follows:

"I know Juan Cano and L. Manse very well. Morales do not recollect so well. Manse was a prominent person. I knew him in Victoria. Cano and Manse lived first in Victoria, afterwards on the west side of the Lavaca river. They were all, viz., Manse, Cano, and Morales, colonists of the colony of Martin De Leon. They came to the colony in the year 1831 or 1832, when Manse and Cano settled on the Lavaca in the latter part of 1833, or the beginning of the year 1834."

Bill of Exceptions, continued.

Plaintiffs then offered in evidence the deposition of Fernando De Leon, taken by the defendants in this suit on the 19th day of December, 1853. To admission of which the defendant by his counsel objected, on the following grounds:

First. That said De Leon was interested in extending grants to colonists, he, as empresario, receiving a bonus therefor from the existing government.

Second. Because said De Leon was interested in vindicating the validity of his own act, in extending the grant to Juan Cano; which objections were overruled by the court, and the deposition read to the jury, as follows. To which ruling of the court the said defendant Cook, by his counsel, excepted.

Fernando De Leon, deponent referred to.

District Court of the United States, District of Texas.

A. T. BURNLEY
v.
S. A. WHITE and others.

Interrogatories to be propounded to witnesses to be examined by a commissioner of the United States in the above case, and the other cases in which, by agreement, evidence taken in this case shall apply.

First Interrogatory. Look at the deeds which are now presented to you. Between what parties are said deeds? Do you know anything, and if anything what respecting the instrumental and assisting witnesses to said deed, and the signatures of said witnesses; where are said witnesses, and each of them, now? are the signatures or not purporting to be the signatures of said witnesses to said deeds, their

genuine signatures? state all you know on this subject. Are you or not acquainted with the signatures of the grantors in said deeds, respectively, and of the officer before whom they were made, if so, are the signatures to said deeds genuine or not? whose signatures are they? state all you know respecting the signatures purporting to be the signatures of the grantors in said deeds, and of the officer before whom made, and was he or not such officer to describe said deeds by indorsement as to identify them with your deposition? State all other facts and particulars which you may know, which will be of advantage to the plaintiff in his suits.

In answer to interrogatories propounded by plaintiff hereto attached. That the parties to said deeds are, first, a deed from Juan Cano to Leonardo Mauro, marked A. He recognizes the writing of the body of the deed as the writing of Placedo Benevedes, the secretary of the commissioner of this colony, and also secretary of Diego Garcia. He recognizes the signatures of the officer, Diego Garcia, and those of the assisting witnesses, Alego Perey and Jose M. Escalara, as genuine. Alego Perey is in Metamoras, Jose M. Escalara is dead, Diego Garcia is dead. I do not know anything of the particular transaction; all he knows is that the sale is regular and before the proper officer.

2d. As to the deed, marked B, from Miguel Castello to the said Leonardo Mauro, and third, the deed marked C, from Beneto Morales to Leonardo Mauro, he recognizes the signatures to be the same as those to the deed marked A, and as genuine; the land described in the deeds is a part of the lands granted to the grantors in these deeds by the witness as a commissioner, and by the special order of the President of the Supreme Government of Mexico, to issue titles to the settlers on the littoral leagues. Before he, as commissioner, gave the titles, the settlers on the land had documents called Amparos, or a certificate of possession from Martin De Leon as judge and empresario. The families on the littoral leagues were all Mexicans, no strangers were permitted to settle on these lands. Previous to the issuance of the titles some of them had possession of the land, but were driven off by the Caronkaways. There was a dispute between Power and Hewetson and Martin De Leon, about the right to settle these lands, from 1826 to (he thinks) 1831. There were no titles issued to these lands pending this dispute, but upon its settlement and the decision of the government these titles were issued. The dispute was finally settled by the Supreme Government of Mexico in favor of Martin De Leon.

Cross-Interrogatories.

If you say you know where the instrumental and assisting witnesses are, then state how you know it. If you say that you are acquainted with their signatures, then say whether or not you ever

saw them write. If you say that you know the signatures of the grantors and said officer, then say whether or not you ever saw them write. If you say that you know any of the grantors, then state when and where you knew them. What countrymen are they? Where did they reside in 1834? Where in 1835, 1836, and 1837? If you say he was such officer, how do you know it?

We agree that depositions of witnesses may be taken on all the foregoing interrogatories and cross-interrogatories without further notice, by any one authorized to take depositions, *de bene esse*, under the laws of the United States.

J. A. & GEO. W. PASCHAL,
W. P. BALLINGER.

De Leon, the witness, Answer to Cross-Interrogatories.

I know Alego Perez is in Matamoras, having seen him there about two months past; I know the other is dead. I did not see him sign these deeds, but has seen them write their names frequently. He has seen the officer write. He knew the grantors in said deeds here. He knows Miguel Castello, in 1844, in Matamoras, and subsequently in Victoria. He knew the others here about three years before he gave the title; they are Mexicans. In 1834 and 1835 they lived here; they left here in 1835 and 1836; he does not know where they lived in 1837; some of them went to the Rio Grande, and some of them to Opelousas. He knows that he was an officer, because a decree passed to him from the political chief; the said Garcia was authorized to qualify or legalize stamped paper for the use of the State of Coahuila and Texas, as he may judge.

FERNANDO DE LEON.

Bill of Exceptions, continued.

Plaintiffs then read in evidence the deposition of Nicholas Benevedes, taken by the defendants in this cause. On the sixth day of December, 1853, as follows:

Nicholas Benevides Deposition.

That he was not acquainted with Leonardo Mauro. He was a citizen of Martin De Leon's colony. That he first made a settlement, first in the year 1833 or 1834 on Green Lake, and lived there for a short time, then he moved up on the Lavaca river. In the fall of the year 1834, Mauro took his family and moved into the State of Louisiana, on account of his being a Spaniard, and he was not permitted to remain in the country. The Mexican citizens, after the revolution of the Republic, in 1836, said Mauro moved with his family to the Rio Grande, to the town of Reynosa; does not know where

he lives at this time. That the witness has been a resident in said De Leon's colony; that is to say, he came to the colony in the year 1827, and remained there until the year 1835. That he has no distinct recollection of any such men as Juan Cano and Benito Morales. Does not know whether they were peons, cow-drivers, or in what capacity, if any, they resided with Leonardo Mauro.

NICHOLAS BENEVEDES.

Bill of Exceptions, continued.

Plaintiffs then read in evidence the deposition of Margaret T. Wright, taken by the defendants in this cause on the 6th day of December, 1853, *de bene esse*, without notice, as follows:

That she knew one Leonardo Mauro, who was for a short time early in the year 1834, in Martin De Leon's colony; he was a Gauchapin, and was not allowed to remain in the country. In the fall of the year 1834 he was compelled, on the account of his being a Gauchapin, to leave, and he took his family and removed to the State of Louisiana, and there remained until late in the year 1836, when she (witness) was at his house, in the State of Louisiana. Witness states that Mauro, when about leaving, in 1834, said he was leaving in obedience to the decree of the State banishing all Spaniards, and he was a Spaniard to witness's knowledge.

The part in brackets, as follows: ["But was never considered a citizen of De Leon's colony"], also, ["The witness understood, and so it was generally understood, that he (Mauro) was travelling, and made a short stay in the colony of De Leon"], was not read by plaintiffs, because not competent testimony. The defendants objected to the omission of said parts in brackets, and that plaintiffs were bound to read the same, but the court overruled the said objection of defendants, to which ruling of the court defendants excepted. The defendants read the remainder of said deposition, as follows:

He (Mauro) never returned to said colony, nor does she, witness, know what ever became of him after seeing him in 1836, in the State of Louisiana. The witness further states that she was intimately acquainted with all the colonists of Martin De Leon's colony, from the year 1825 to 1836, and she never knew any colonists *and she never knew any colonists* by the name of Juan Cano and Benito Morales. There might have been such persons, but if there was, they must have been peons; they could not have been colonists, as she was well acquainted with all the colonists generally, and she is positive she knew no such colonist.

MARGUERETE T. WRIGHT.

Plaintiffs here closed their case.

Bill of Exceptions, continued.

And the said defendant, to maintain and prove the issues on his part, introduced in evidence the record in the case of Albert T. Burnley and Levi Jones against William M. Cook et als., from the District Court of the State of Texas, of Harris County, and the Supreme Court of said State, as follows:

Transcript of Record from Harris County.

Appeal from Harris County to the Supreme Court.

JONES & BURNLEY
v.
COOK and others.

It is agreed that this case shall not be argued at this term of the Supreme Court, but shall be continued until the next term of court, and the appellants shall have the right at any time before the next term of court to bring up the record, and the appellees will waive any objections to the bringing up of the case.

J. A. & G. W. PASCHAL,
Attorneys for Appellees.
W. P. BALLINGER,
For Appellants.

The State of Texas, Harris County.

At a term of the District Court, begun and held in and for the county aforesaid, on the 17th day of May, in the year of our Lord one thousand eight hundred and fifty-two, before the Hon. C. W. Buckley, judge thereof, the following cause came on for trial, viz.:

A. T. BURNLEY & LEVI JONES
v.
WILLIAM M. COOK et als.

Petition filed February 4th, 1852.

J. H. DAVIS,
Clerk.

Filed May 22d, 1852.

F. R. LUBBACK,
Clerk.
By J. B. DART,
Deputy D. C. H. C.

State of Texas, County of Calhoun.

To the Hon. C. W. Buckley, judge of the seventh judicial district of the State of Texas.

The petition of Albert T. Burnley, a resident of New Orleans,

Louisiana, and Levi Jones, a resident of said county of Calhoun, complaining of William M. Cook, of said last-named county, James H. Baldridge, and Josiah W. Baldridge, Sparks, Chipman, now a resident of Louisiana, but expected to be in said county of Calhoun, in which process is prayed, and of Solomon Cunningham, also of said county of Calhoun, defendants herein, respectfully represents unto your honor that the honorable the judge of the tenth judicial district is a brother, and the honorable the judge of the first judicial district is a relation of your petitioner herein, Levi Jones, and the said last-named judge is also absent at this time from the State of Texas; wherefore your petitioners address themselves for the injunction which will be hereafter prayed to your honor; that your petitioners are the lawful and rightful owners of a certain tract or parcel of land lying in the said county of Calhoun, bounded and described as follows, to wit: Situated on the west shore of Matagorda bay, commencing at a stake that stands on the deep break of said bay, the same being the third and last landmark of the league surveyed for Santiago Gonzales, and first of this survey; thence south forty-five degrees west with the line of the above-mentioned Gonzales, at two hundred and forty-five varas, there is a small mound, called Artialgas mound, where there is a stake, from which to the east at the distance there is a palo blanco with a mark of a letter A, and it is six inches in diameter; thence following the same line south forty-five degrees west, seven thousand and nine hundred varas, to a stake in the plain, that is, the third landmark for both the surveys; thence north forty-five degrees west with the lower line of Faustins Alvarado, seven thousand six hundred varas to a stake in the plain: this is the third landmark of this survey and of the said Alvarado; and thence north forty-five degrees east, five thousand one hundred and forty varas, where a stake was driven on the deep break of said bay for the fourth and last landmark of this survey; and thence following the bends of the bay to the place of beginning, containing an area of forty-six millions square varas, equal to one league of grazing land; at least one-half of said area being covered with salt bays, and it was also destitute of timber and fresh water. That the said ledge of land was within the jurisdiction of the Empresario Martin De Leon, who had the assent of the general government of Mexico to colonize and extend titles to settlers on the same; and that a title to said land, describing it as above stated, was extended by the commissioner, Fernando De Leon, to one Juan Cano, on the 11th April, 1835, and that your petitioners are the just and lawful owners of said land by valid and regular mesne conveyances to them, the said Burnley being the owner of an undivided three-fourths thereof, and the said Jones of the remaining one-fourth, that is to say, that the interest of said Jones has been sold at marshal's sale to one Royal A. Porter, of Louisiana, but by valid agreement between said Porter and Jones your said petitioner, Jones, remains in the possession,

interest, and beneficial use thereof, and has until the 1st day of July, 1852, to redeem his said interest, which he fully intends doing, if his circumstances will enable him to do so.

That your said petitioners have been in the actual possession and occupancy of said lands, for more than four years continuously last past; that the said league of land is of great value, and embraces, as your petitioners believe, the most eligible advantages and valuable town sites on Matagorda bay. That your petitioners have been at great trouble and expense, in having the said town site known and designated as La Salle, situated on the west shore of Matagorda bay and on said Juan Cano league, surveyed, marked and laid off; in procuring, and causing to be published maps thereof and of the surrounding, and in making known and developing the advantages and superiority of location and facilities of the said town site; in procuring soundings and surveys to be made of the various bars, harbors and points of importance on the said bay of Matagorda. Your petitioners show that the only point of the coast, on the said western shore of Matagorda bay, near which vessels can anchor, was to be reached by a wharf from the shore, is that commencing immediately north of Powderhorn bayou, which bayou is on the Juan Cano league, about half a mile north from La Salle, and extending along the coast about three miles south of La Salle, making in all a distance of about five miles; that the coast north and south of this is shoal, and vessels are compelled to lighten in order to discharge and receive their cargoes; that the land on this entire front is the property of your petitioners, as before stated, but your petitioners have, at great expense and pains, ascertained and determined upon La Salle as the best point for a town, and inevitably destined to be the commercial point on said bay. Your petitioners show that the Powderhorn bayou is a bayou about fifty yards wide at its mouth, and extending from the bay into the Juan Cano league about six hundred yards, and then spreading out into a large, shallow, salt marsh or lagoon, the greater part of which is in the Juan Cano league; that small boats can enter into the mouth of said bayou, and receive cattle and carry them to the Gulf steamers; that your petitioners have always had an eye to the advantages which said bayou would afford them, for this kind of business, though for many reasons it was not the place for the town. Your petitioners further show, that some time in the year 1849, the defendant herein, William M. Cook, caused the location of a land certificate, for three hundred and twenty acres of land, to be made on the north side of Powderhorn bayou, along said bayou and to the shore of Matagorda bay; that the said location is wholly within the said Juan Cano league, the northern boundary of which is more than two miles north of said bayou. Your petitioners further show, that, although your petitioners, especially the said Levi Jones, for five years past has been engaged in endeavoring to build up La Salle; that owing to reverses of fortune, he has been

obliged to prosecute his efforts without capital or means, or by seeking to obtain the aid of those who possessed capital; that about the time when the sale of the said Jones' interest took place as aforesaid, and it was understood that his circumstances were greatly embarrassed, the said Cook, in junction with others, laid off a town site immediately north of Powderhorn bayou, and commenced efforts to build up the same; that the influential aid and agent of said Cook therein, was a certain William Henry Brown, who first made overtures to said Jones, to act under his title herein asserted, but failing in this, he united with said Cook; that he and those with him having deserted from their works, however, a certain Solomon P. Cunningham, defendant herein, offered to this defendant the use of a thousand dollars, for the privilege of shipping cattle from the said Powderhorn bayou, and proposed to aid in the construction of a wharf at La Salle, but that said Cook being maliciously disposed to your said petitioner, and anxious for his injury, by numerous misstatements, as your said petitioners believe, induced the said Cunningham to withdraw his proposition from your petitioners, and commenced shipping cattle from the said bayou under the pretended authority of said Cook; that the said Cook, as your petitioners are informed and believe, has by like misstatements, with a view to the injury and prostration of your petitioners, especially the said Jones, procured the defendants herein named, James H. & Josiah W. Baldridge, —— Sparks and —— Chipman, to agree to build a wharf, warehouse, and other buildings and works, at Powderhorn bayou, and on said pretended location of said Cook; and that said Cook is giving out and pretending that he has the means, and will speedily commence the building up of a town at Powderhorn bayou, but they show that owing to the embarrassed circumstances of your petitioners, especially of the said Jones, to the fact also that unless he can obtain pecuniary aid upon the prospects of value of the said town of La Salle, and by sale of property therein, he will be compelled to sacrifice his interests in the same, the said acts of the defendants herein, are of great and irreparable damages to your petitioners; that they believe that public confidence exists in the advantages of La Salle, that large sales of property can therein be effected, and pecuniary aid obtained, which will enable your petitioners to proceed rapidly with the building of La Salle, and obtain large profits therefrom, but that if persons desirous of making investments at the best point on Matagorda bay, continue to see the said Cook, and those under him, engaged in said acts at Powderhorn bayou, and giving out and pretending that it will be made a rival town site, also your petitioners fear that it will be impossible to effect said sales or procure investments, at least until their own pecuniary ruin is consummated. That your petitioners verily believe that the movements and acts of the said Cook, have been greatly actuated, and are now so in a great degree, by hostility to your petitioners, and not in

assertion of what he believes to be a valid and bona fide title to said property; and that your petitioners have already suffered, and will suffer, irreparable damage from the said acts of the defendants, unless aided by the injunction of your Honor.

The premises considered, your petitioners pray for a writ of injunction, to restrain the said defendants and each of them, their agents and hirelings, from entering upon the land immediately north of Powderhorn bayou, in the said county of Calhoun, for the distance of eleven hundred varas north of said bayou, and north of which the said Juan Cano grant extends; and from hauling or placing any lumber, timber, or materials of any kind upon the said lands; and from building any dwelling-house, store, or warehouse, or building any other house or structure on said land; and from building any wharf or other structure, extending from any part of said land into Matagorda bay. Said injunction to be of such character, and of such terms and conditions, as your honor may deem meet. And that on the final hearing, said injunction be made perpetual, with ten thousand dollars, which petitioners aver to be their damages, and for cost and for general relief. Your petitioners pray for citations against said defendants, directed to the sheriff of said county of Calhoun, in which they reside or will be found.

JONES, BUTLER & BALLINGER,
Attorneys for Petitioners.

Affidavit.

The State of Texas, County of Calhoun.

Personally appeared before me, C. W. Buckley, judge of the seventh judicial district, Levi Jones, one of the above-stated petitioners, who, after being duly sworn, saith that the facts set forth in the foregoing petition, as stated of his own knowledge, are true; and those upon information of others, he believes to be true.

LEVI JONES.

Sworn to and subscribed before me, this 25th day of December, A.D. 1852.

C. W. BUCKLEY,
Judge 7th Judicial District.

The State of Texas. To the Clerk of the District Court of Calhoun County.

The injunction, as prayed for in the foregoing petition, granted; and the clerk of the District Court of Calhoun will issue the same on petitioners or either of them entering into bond, with good security, in the sum of ten thousand dollars, conditioned according to law.

C. W. BUCKLEY,
Judge 7th Judicial District.

GALVESTON, December 26th, 1851.

Filed February 4th, 1852.

J. H. DAVIS,
Clerk.

Filed May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Injunction Bond.

Know all men by these presents, that we, Levi Jones, as principal, Henry B. Martin and Michael B. Menard, as securities, are held and firmly bound unto William M. Cook, James H. Baldridge, Josiah W. Baldridge, Sparks, Chipman, and Solomon G. Cunningham, in the just and full sum of ten thousand dollars ($10,000), for which payment well and truly to be made we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our scrolls for seals, and dated this 17th day of January, 1852.

The condition of the above obligation is such, that whereas the above-named Levi Jones, with A. T. Burnley, filed their petition on the 25th day of December, 1851, before the Honorable C. W. Buckley, Judge of the Seventh Judicial District, praying an injunction to restrain the said W. M. Cook, and others named in said petition, from entering upon the land immediately north of Powderhorn bayou, in Calhoun County, for the distance of eleven hundred varas north of said bayou; and from hauling or placing any lumber, timber, or materials of any kind upon the said land; and from building any dwelling-house, store, or warehouse, or building any other house or structure on said land; or from building any wharf or other structure, extending from any part of said land into Matagorda bay; which said injunction has been granted and ordered to be issued by the said Hon. C. W. Buckley, judge, &c. Now, therefore, if the said Levi Jones and A. T. Burnley will abide the decision which may be made in said injunction, and will pay all sums of money and costs that may be adjudged against them or either of them, if the said injunction be dissolved either in whole or in part, then this obligation to be null and void; otherwise, to remain in full force and effect.

LEVI JONES, [L. S.]
H. B. MARTIN, [L. S.]
M. B. MENARD, [L. S.]

Signed, sealed, and delivered in presence of
W. P. BALLINGER,
J. BATES.

I, James W. Moore, clerk of the District Court of Galveston

county, certify that H. B. Martin & M. B. Menard, the securities in the foregoing bond, are good and sufficient for the same, and such as I would willingly take in a similar bond.

GALVESTON, January 17th, 1852.

J. W. MOORE,
Clerk.

Approved by me, Feb. 4th, 1852.

I. H. DAVIS,
Clerk.

Writ of Injunction.

The State of Texas, County of Calhoun, in the District Court of said County.

To William M. Cook, James H. Baldridge, Josiah W. Baldridge, —— Sparks, —— Chipman, Solomon Cunningham, and their counsellors, attorneys, solicitors and agents, and each and every of them, greeting:

Whereas, Albert T. Burnley and Levi Jones have lately exhibited their petition of complaint in our said Court, against you the said William M. Cook, James H. Baldridge, Josiah W. Baldridge, —— Sparks, —— Chipman, and Solomon Cunningham, defendants, to be restrained touching therein complained of, in which petition it is set forth among other matters, that you, the said defendants, combining and confederating to injure the complainant touching the matters set forth in said petition and that the actings and doings of you the said defendants touching the matters in said petition mentioned, are contrary to equity and good conscience, and after consideration the court now being sufficiently advised, it is ordered that said injunction be granted, enjoining said defendants from committing any trespass and wrong upon the lands of complainant within the metors and bounds as set forth in the petition of complainants, until the final hearing of this cause. We therefore in consideration of the premises, and the particular matters in the petition set forth, do strictly enjoin and command you the said William M. Cook, James H. Baldridge, Josiah W. Baldridge, —— Sparks, —— Chipman, Solomon Cunningham, and each of you, and each of your hirelings and confederates, and all other persons whatsoever, from building or commencing to build on such, or if built or erected, from using any wharf, pierhead, scaffolding, or other structure for receiving, landing, or shipping goods from or on vessels, at or in front of Powderhorn bayou, in or on Matagorda, and at or in front of any other point along said Matagorda Bay, within eleven hundred varas north of the mouth of said Powderhorn bayou, or south thereof within the limits of LaSalle, and from building or erecting or removing any houses, stores, hotels, warehouses, or other buildings, or from occupying or in any manner using the same, and surveying, laying off,

dividing, marking any town site or lots upon the land eleven hundred varas north of the mouth of Powderhorn bayou, of south thereof within the limits of La Salle, or from erecting upon the said premises, either themselves, or with any wagons, carts, carriages, horses or boats, and from doing any and everything on the said premises in any manner calculated to injure or oppose or obstruct the building of the said town of La Salle, or the sale of property therein, or in any way to lessen, impair, or diminish the value thereof, until the further order of this court, under the pains and penalties of the law. Witness, J. H. Davis, clerk of the District Court for the county of Calhoun, and the seal of the said court at office in the city of Lavaca, this eleventh day of February, one thousand eight hundred and fifty-two.

J. H. DAVIS,
Clerk D. C. C. C.

Issued February 11th, 1852.

J. H. DAVIS,
Clerk.

Sheriff's Return.

Received, February 11th, 1852. Served on W. M. Cook, 11th February. Served on Chipman, 26th February.

Came to hand on the 11th day of February, A. D. 1852, and served on Wm. M. Cook the same day, also on Chipman the 26th day of February, 1852, by delivering to each of them a certified copy of this writ of injunction.

JAMES B. FOULKERSON,
Sheriff C. C.

Served the writ of injunction to which this is attached as a part of the return thereof, as James H. Baldridge, one of the defendants named therein, on the 15th day of March, A.D. 1852, by delivering to him a certified copy of the same.

JAMES A. FOULKERSON,
Sheriff, C. C.
By his deputy, R. D. MARTIN.

INDIANOLA, March, A. D. 1852.

No service has been had in the within-named defendants, viz., Josiah W. Baldridge, —— Sparks, and Solomon Cunningham, they not to be found in the county.

Filing.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Citation.

The State of Texas. To the sheriff of Calhoun county, greeting:

You are hereby commanded to cite William M. Cook, James H. Baldridge, Josiah W. Baldridge, —— Sparks, —— Chipman, and Solomon Cunningham, if found in your county, to appear at the next term of the honorable District Court of Calhoun county, to be held at the court-house in the city of Lavaca, on the third Monday after the third Monday in March next, then and there to answer the petition of Albert T. Burnley and Levi Jones, exhibited against them in our said court, a copy of which is hereunto annexed. Herein fail not, &c., and have you at our said court this writ, with the service indorsed as the law directs.

Given under my hand and seal of the District Court, at the District Clerk's office in the city of Lavaca, this 11th day of February, 1852.

J. H. DAVIS,
Clerk D. C. C. C.

Sheriff's Return.

Came to hand, February 11th, 1852.

JAMES P. FOULKERSON,
Sheriff, C. C.
By his deputy, R. D. MARTIN.

Served upon William M. Cook, on the 11th day of February, A. D. 1852, and Chipman on the 26th day of February, 1852, by delivering to each of them a certified copy of this writ and the petition; and the balance of the within-named defendants, viz., Josiah W. Baldridge, —— Sparks, and Solomon Cunningham, not to be found in the county.

JAMES P. FOULKERSON,
Sheriff.

Served on J. H. Baldridge, the 13th day of March, 1852, by delivering to him a certified copy of this writ and petition.

JAMES C. FOULKERSON,
Sheriff.
By R. D. MARTIN,
Deputy.

Filing Motion.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Filed, 16th, 1852.

J. H. DAVIS,
Clerk.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

District Court, Calhoun County, March, 1852.

A. T. BURNLEY & LEVI JONES
v.
WILLIAM M. COOK et al.

The defendants by attorney move the court to dismiss the above entitled cause, because this court has no jurisdiction of the same, and because the cause is improperly and illegally upon the docket.

A. S. CUNNINGHAM,
For Defendants.

District Court, Calhoun County, March, 1852.

A. T. BURNLEY & LEVI JONES
v.
WILLIAM M. COOK.

The defendants by attorney move the court to change the name and send the said cause to the county of Harris, in the seventh judicial district, within the jurisdiction of Judge Buckley, who granted the original injunction, or to some other district, owing to the consanguinity existing between the plaintiff, Levi Jones, and the judge of this district.

A. S. CUNNINGHAM,
For Defendants.

Motion by Plaintiffs.

Filed, 20th March, A. D. 1852.

J. H. DAVIS,
Clerk.
By A. T. HENSLEY,
Dept. D. C. C. C.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

The State of Texas, Calhoun County, District Court, Spring Term, 1852.

A. T. BURNLEY & LEVI JONES
v.
WILLIAM M. COOK et al.

In this cause plaintiffs by attorney move the court to set aside the

order transferring this cause to the court for the county of Harris, for the following reason: that three of the defendants, Solomon Cunningham, Josiah Baldridge, and —— Sparks, have not been served with either the citation or injunction from the court.

LYSLE & STOCKDALE,
Attorneys for Plaintiffs.

Agreement.

Filed, March 25th, 1852.

J. H. DAVIS,
Clerk.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

In the District Court for Calhoun County.

A. T. BURNLEY & LEVI JONES
v.
WILLIAM M. COOK et al.

It is agreed between the parties to the above entitled cause, that the order of court made on the agreement of counsel shall stand, as the court and the plaintiffs hereby withdraw their motion to set aside the same, and agree that it may be overruled.

LYSLE & STOCKDALE,
For Plaintiffs.
A. S. CUNNINGHAM,
For Defendants.

Transcript from Calhoun County.

The State of Texas, County of Calhoun.

Transcript of the proceedings had before the District Court of Calhoun County, in a certain cause pending in said court, wherein Albert T. Burnley and Levi Jones are plaintiffs, and William M. Cook, James H. Baldridge, Josiah W. Baldridge, —— Sparks, —— Chapman, and Solomon Cunningham, are defendants, as taken from the minutes of said court.

Injunction.

Spring Term, 1852; the 5th day of Term.

ALBERT T. BURNLEY and LEVI JONES
v.
WILLIAM M. COOK et al.
No. 142.

This day came on the motion of the defendants to be heard, to

change the venue of this. Which motion is sustained by the court. Whereupon, it is ordered by the court, that the venue in this cause be changed, and by agreement of parties, the trial adjourned to Harris county; and that the clerk of this court make a transcript of the proceedings herein, and transmit the same, together with the papers on file in this cause, to the clerk of the District Court of said county of Harris.

The 11th day of Spring Term, A.D. 1852.

A. T. BURNLEY and LEVI JONES
v.
WILLIAM M. COOK et al. } No. 142.

As per agreement filed in this cause, the plaintiffs' motion to set aside the order of the change of venue in this cause be overruled, and the plaintiffs withdraw the motion.

The State of Texas, County of Calhoun.

DISTRICT COURT, CLERK'S OFFICE,
March 29th, 1852.

I, J. H. Davis, clerk of the District Court of Calhoun County, do hereby certify that the foregoing is a true and correct transcript of the proceedings had, and the orders made by the District Court of Calhoun County, in the cause aforesaid. And further, in obedience to the order of said court, I herewith transmit all the original papers on file in this office, and seal up and inclose the same, to the clerk of the District Court of Harris County, amounting to eight papers, exclusive of this paper.

Given under my hand and seal of the District Court, at the District Court clerk's office, in the city of Lavaca, on the day and date above written.

J. H. DAVIS,
Clerk D. C. C. C.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Answer of Defendants.

State of Texas, County of Harris.

District Court, Spring Term, 1852.

A. T. BURNLEY and LEVI JONES
v.
W. M. COOK et al.

And now comes the defendants, James H. Baldridge, James W.

Baldridge, —— Sparks, —— Chipman, and Solomon Cunningham, and saving and reserving all exceptions to the insufficiency, inconsistency, and manifest errors of complainants' bill, adopts the exceptions, pleas, demurrers, and answers, together with the references and exhibits of their co-defendant, Cook, on file in said cause, and prays that the same may be taken, held, and considered by the court, as the exceptions, pleas, demurrers, and answers, as aforesaid, of each and every of these defendants in said cause.

J. A. & G. W. PASCHAL.
WALKER & PALMER,
Solicitors for Defendants.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Filed, May 22d, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Answer of W. M. Cook.

Calhoun District Court, March Term, A.D. 1852.

ALBERT T. BURNLEY and LEVI JONES
v.
WILLIAM M. COOK and others.

The separate answer of William M. Cook to the bill of complaint of plaintiffs. This deponent, saving all exceptions to the insufficiency of the complainants' bill, first pleads in abatement to the writ of injunction issued in this behalf, and prays that the same and also the summons may be quashed; and first, because the said writs do not run in the name of the State of Texas, as the Constitution requires. Secondly. Because, as to the said injunction, the same improvidently and illegally issued, the same not having been granted by Fielding Jones, the district judge of said county, but by C. W. Buckley, who had no jurisdiction, power, or authority to grant said injunction; and therefore said defendant prays that said writs may be quashed, and said bill dismissed.

WILLIAM M. COOK.

J. A. & GEO. W. PASCHAL,
Solicitors for Defendant, William M. Cook.

Sworn to and subscribed before me, this 22d day of May, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

And the said defendant, Cook, further says, that said bill was wholly insufficient to authorize the granting of said injunction, and that there is no equity therein. 1. Because the complainant shows that the defendants hold and claim by a valid location made by the said Cook, on said land, and that said Cook claims under said location and a survey therein, which constitute an adverse title to that of the complainants, and therefore the complainants state themselves out of court as to the injunction. 2. Because the complainants show and state no such facts as constitute irreparable waste or mischief. 3. That they aver no such title as authorize the grant of an injunction. 4. Because they show that Royal A. Porter is a legal owner of one-fourth of the land, and they do not show that said Porter is a party; and for these and divers other reasons he excepts to said bill, and prays that said injunction be dissolved and said bill dismissed.

WILLIAM M. COOK.

J. A. & G. W. PASCHAL,
Solicitors for Defendant, Wm. M. Cook.

Sworn to and subscribed before me, this 22d May, 1852.

F. R. LUBBOCK,
Clerk.

By J. B. DART,
Deputy.

And for answer in this behalf, and also to be used as an affidavit to dissolve the injunction, the defendant denies all and singular the plaintiffs' allegations in the petition, except as hereinafter admitted, and says he is not guilty of the several trespasses therein named. And this defendant positively denies that said complainants are the rightful owners of a certain tract or parcel of land lying in the said county of Calhoun, and bounded and described as in the plaintiffs' petition alleged; and he also denies that a grant of said land was ever extended to Juan Cano in accordance with the laws in such cases made and provided by the commissioners of the enterprise of the empresario, Martin De Leon; and the said defendant positively denies that the said Empresario De Leon's colony ever extended to and embraced the said land, but the same was in fact beyond the jurisdiction of the boundaries of the colony of said De Leon. And therefore if any such grant was in fact made, the same was null and void, as well because the same was beyond the limits and jurisdiction of the colony of the said De Leon, and also because the said Martin De Leon had departed this life before the date of the said pretended grant, and there was therefore no authority in the said commissioner, Fernando De Leon, to extend or make said title. As also because, even if the boundaries of the colony of the said Martin De Leon had extended to the said land (which is not admitted, but is positively denied) the said colonial contract was void in this, to wit: because by the fourth

article of the colonization decree of Mexico of 1824, and the 7th article of the colonization decree of Coahuila and Texas of 1825, the state of Coahuila and Texas was restrained from making any grant of lands within the ten littoral leagues bordering on the Gulf of Mexico, without the consent of the President of Mexico, for that purpose had and obtained, and for that purpose, all petitions for enterprises or grants within the littoral leagues were directed to be forwarded to the President of the Mexican States. And the said defendant says, that the said pretended grant of a colonial contract, if ever made, was made without the consent of the President of Mexico, for that purpose first had and obtained, and if ever any such grant was therefore by Fernando De Leon as commissioner of the empresario, Martino De Leon, the same was therefore null and void. And also because this defendant is advised and believes, and therefore charges that no survey of the land pretended to be granted to said Juan Cano, was ever in fact made, and the pretended survey thereof recited in the pretended title therefore void.

And also because, if any such grant was ever made, the plaintiff shows by his bill that the same was void, because that it exceeds, by nearly one-half, twenty-five million square varas; and also for that it crosses a navigable stream, which was contrary to the law in such cases made and provided. And this defendant in fact says, that said Powderhorn bayou was, at the date of said pretended grant, and still is, a navigable stream; and the survey could not therefore legally cross Powderhorn bayou. And this defendant in fact denies, that said survey did cross Powderhorn bayou, or was ever intended to cross Powderhorn bayou; and if proof of this denial were necessary, no better proof of the same could be found than in the fact, that the plaintiffs pretended to account for their excess in quantity, by alleging that the said land is very much covered by Powderhorn bayou, and by the lake, which extends over an area of several miles. Objects so notorious could not have escaped the attention of the surveyor, had any such survey ever in fact have been made. And this defendant denies that the said plaintiffs are the owners of the said pretended grant of land, by regular chain of mesne conveyances down from the said Juan Cano. On the contrary, this defendant denies that the plaintiffs have any such chain of title, and he requires strict proof thereof. And as to the said pretended interest of said Jones, this defendant admits that it is true, that the said Jones mortgaged all his said pretended interest to said Porter, and the equity of redemption of said mortgage was foreclosed, and the right, title, and interest of said Jones was sold at marshal's sale, under a decree of the District Court of the United States, and foreclosed by the said Royal A. Porter, who is yet the owner thereof. And as to any agreement with said Porter, this defendant knows nothing; but he has been informed, and verily believes, and therefore charges, that no such legal and valid agreement exists; but, even if the charge

were true, the plaintiffs show that the interest is depending on a hypothesis which may never happen, and that therefore the said Porter ought to have been made a party, and because he is not, the defendant prays that said bill be dismissed. And this defendant positively denies that the complainants, or either of them, are now, or ever were, in the actual or constructive possession of the said land north of Powderhorn bayou, or of any part thereof, or of any considerable portion of the land south of Powderhorn bayou. On the contrary, this defendant says that he, and those claiming under himself and Samuel A. White, have now been in lawful possession of said land by valid locations and surveys made thereon, now over five years, using, cultivating, and occupying the same by a color of title and valid title adverse to the title of said plaintiffs, which possession and adverse title was well known to the said plaintiffs; and in proof of this fact, this defendant here refers to a copy of the record and proceedings in the cause of said Albert T. Burnley *v.* Moore & Siebald, for the survey of said Juan Cano league, and files the said copy marked (a certificate) A (1); and also to a copy of the record and proceedings of a certain common law suit of Albert T. Burnley *v.* John Henry Brown; to this, and also to copies of certain chancery proceedings in the United States District Court, in favor of said Burnley *v.* John Henry Brown and others, marked C, Nos. 1, 2, 3, 4, 5, 6; and this defendant says, that all of said causes are now pending, except the said common law cause against Brown and others (which the plaintiff, Burnley, dismissed to avoid a trial), in the United States District Court for the district of Galveston.

That a hearing, to attach this defendant for a contempt of said injunction, was held before the judge of said court, and the motion refused; that a motion for an injunction against this defendant and said Cunningham was made, and after solemn argument, refused. And this defendant now refers to all said papers as part of his answer, and insists, that pending said common law and chancery suit, to try the title of the plaintiff had no right to the injunction. And this defendant, also, here exhibits and files the brief used by his counsel in the argument of the motion for the injunction before the United States judge, and prays that the same, and the authorities there cited on the motion to dissolve the injunction, which this defendant insists was improperly granted, may be considered (C. C.), and the same will also appear in certain judicial proceedings marked X. This defendant admits, that the land lying within the boundaries described, is of immense value, and embraces the most eligible site for a city on Matagorda bay; that the complainants have been at great trouble and some expense in having La Salle designated as a town site; but as an answer to this part of the complainants' bill, he refers to his answer to the same charge in the bill and supplemental bill of the said Burnley herein filed. Whatever may have been the expense and advantages, they only prove the folly of a bad selection.

La Salle is yet only a city on paper; it has none of the improvements of a town. And this defendant positively denies that the land along the whole front, on Matagorda bay, is the property of complainants; the charge is untrue in whole and in part. The complainants can never establish their legal title to one foot of the same, and if they ever had a pretended title it has long since been parted with by both the complainants. This defendant says, that Powderhorn bayou is a navigable stream, about 186 feet wide, a stream in which vessels drawing eight or nine feet of water, can ride at anchor; that it extends out into a lake some three miles wide; that its public and free use is of importance and the commerce and navigation of the country; and as part of his answer herein, the defendant refers to his answer to the bill already herein referred to, and says that said statement and facts are true. This defendant admits that it is true; that on the 5th day of January, in 1847 (not 1849, as the plaintiffs well knew), he caused a location to be made on the north side of Powderhorn bayou, extending up said bayou and along Matagorda bay, as the diagram here exhibited, marked E., will show. This defendant here again denies that said location is or can be within the boundaries of said Juan Cano league, and he here again insists, that as said complainants show that said defendants hold under said title, they show that they hold adversely, and state themselves out of court as to the injunction, and on that account said injunction ought to be dissolved. This defendant admits that said Jones may not have had extensive capital, but had the site been selected on the north of Powderhorn bayou and secured by a valid title, a large city might, before this time, have been built up. This defendant admits that in 1849 he laid off a town on his own land, on Powderhorn bayou; that John Henry brown and others commenced the erection of a wharf, and for the facts of this matter defendant particularly refers to his answer in the District Court of the United States. This defendant says, that the enterprise was delayed in consequence of the vexatious suit by said Burnley, carried on by said Jones, as his agent, but in fact, for himself, and the collusive judgment or decree in said cause, caused by the fraud of the said Jones and Burnley. This defendant says, that under the instruction of his counsel he disregarded said injunction, and the said judge of the United States District Court issued a rule against this defendant and others, to show cause why he should not be attached for a contempt, and, as will be seen by the proceedings herein filed, the court refused the attachment.

The said Jones and Burnley then caused a supplementary bill to be filed against this defendant, as will be seen from the proceedings. The injunction and the cause has not yet been brought to a hearing. This defendant says, that having perfect confidence in his own title, and willing to risk the issues at law, and supposing that he should be at peace until the trial of the issues at law, this defendant contracted with the co-defendants, Baldridge, Sparks & Chipman, who are not

yet served with process, to erect a wharf, a warehouse, a hotel, and other valuable improvements, which will cost a large sum, to wit, fifty thousand dollars, or some other such large sum; and this defendant says that said parties have already gone to great expense in purchasing and forwarding lumber and other materials, which is now hourly expected to arrive at the spot, if it has not already arrived, and the continuation of said injunction would be attended with ruinous loss to said defendants. And, all conflict of title out of the question, this defendant asks, if the erecting of such buildings, and carrying on such an enterprise, would result in any destruction of the freehold, ruin to the soil, or irreparable mischief. This defendant insists that it would only enhance the value of the property, and if the plaintiff recovered, he would also recover the improvements, and have a town at the right spot, already far advanced. The writ of restitution would alike extend to all in possession; and if, as the petitioners allege, no permanent improvement be made, then no injury could result to La Salle. But this defendant denies that the complainant has the exclusive right of building a town on Matagorda bay; and even if it were true, that by restraining these defendants the said complainants would be able to make great sales of lots, it would be an act of great injustice to them, and serious injury to the commerce of the country. But this defendant denies that such an injunction could result to the injury of complainants. The same charge was made two years ago, as will be seen by the exhibits; and the additional charge was then made, that a sale of the lots had been advertised. Yet, with all the extraneous aid of the Federal courts, injunctions, and all the exertions used, La Salle is just as it then was, only worse. No lots have been sold, and no advantages derived from so ambitious and illegal a course. This defendant denies the truth of the statement. And as to the charge about the overtures made by John Henry Brown & Cunningham to the said Jones, this defendant knows nothing, but refers to his answer to the same charge in the United States Court. It is true that the said Cunningham commenced shipping cattle at Powderhorn bayou; but there was no wharf at La Salle, and no suitable wharf for the purpose on Matagorda bay. This was absolutely necessary to the trade and commerce of the country, and in no way injured the freehold. It was only the use of a navigable stream as a highway, and the bay in common with the public. It is true that this defendant gives out that he intends to build a town at the Powderhorn bayou; and so he does, unless restrained by a more lawful means than have hitherto been employed of the plaintiffs. This defendant denies that he is therein influenced by malicious feelings towards said Jones. He entertains commiseration, rather than anger, towards one who pursues so forlorn a hope on so flimsy a pretext, who finds it necessary to fill a legal proceeding with voluminous assertions, which, when reduced to

simple facts, only assert the exclusive privilege of destroying the commerce of the entire country.

This defendant had well hoped that when he had so dearly established his peace in a court of the said Jones' own selection, that he would not again be troubled with the courts, which the said Jones, in his original bill, more than repudiates. And he feels confident that had complainants given this defendant an opportunity of being heard, this injunction would never have been granted. This defendant' here again denies all improper motives, and insists that he only seeks to use his own property for his own purposes, and for the commerce and prosperity of the country. And this defendant denies all manner of fraud, and says he has been in the lawful possession of said land, and for more than three years under title next before the commencement of said suit, and further plea says that the defendants action accrued more than three years next before the commencement of this suit, and that he has been in possession more than five years under title, and this defendant pleads his own title, and prays that the plaintiff may be enjoined from interfering with his title or possession, or from setting up or asserting their own title, or from doing any other act to the prejudice of this defendant. And defendant now files a copy of his field notes marked Z., and says that ever since the date of his location, on the 5th day of January, 1837, the said plaintiffs have, at divers and sundry times, uttered and repeated to various persons, sundry and various slanderous words, to the effect that this defendant had no title to the said premises, and on repeated occasions called his title into question, and they have caused to be instituted against John Henry Brown and others, hereinbefore referred to, and also against this defendant, whereby they have caused this defendant to be put to large expenses in employing lawyers, paying costs, and otherwise, and they have delayed and hindered his wharf and warehouse, and selling town lots within said boundary, and have often interrupted his possessions, and on one occasion caused his tenant to move to them, and have, by these ruinous practices and slanders, greatly injured and damaged this defendant, to wit, fifty thousand dollars; and therefore this defendant pleads said damages in reconvention, and prays that at the trial they may be adjudged to him against said plaintiffs. Without this, that, &c., &c. And this defendant, &c.

WM. M. COOK,
J. A. & GEORGE W. PASCHAL,
Sols. for Defendant.

The State of Texas, County of Harris.

Personally appeared before me, F. R. Lubbock, Clerk of the District Court, in and for said county, at my office in said county, Wm. Cook, to me well known, who, being by me duly sworn, upon oath says, that the matters and facts set forth in the foregoing twelve

pages are true, so far as stated of his own knowledge are true, and so far as stated of the knowledge of others he believes to be true.

WM. M. COOK.

Sworn to and subscribed before me, in my office, as aforesaid, this the 22d of May, 1852. F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Judgment.

A. T. BURNLEY and LEVI JONES
v.
WILLIAM M. COOK et al. } No. 2412.

May 28th, 1852.

This day came the parties aforesaid, by their attorneys, and the motion herein filed, to dissolve the injunction herein granted and to dismiss the bill, having been submitted to the court upon brief, and after due consideration thereof, it is considered, ordered, adjudged, and decreed by the court, that the injunction in this case be dissolved and the bill dismissed, and that William M. Cook, James H. Baldridge, Josiah W. Baldridge, Sparks, Solomon Cunningham, and Chipman, the defendants in the injunction, have and recover of the plaintiffs, Alfred T. Burnley and Levi Jones, and their securities, Henry B. Martin and Michael B. Menard, all cost in and about this suit sustained and expended, for which execution may issue. The plaintiffs give notice of appeal.

Approved and filed, June 4th, 1852.

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Appeal Bond.

The State of Texas, County of Harris.

Know all men by these presents, that we, Albert T. Burnley and Levi Jones, as principals, and Henry B. Martin and Michael B. Menard, as securities, are held and firmly bound unto William M. Cook, Solomon Cunningham, Josiah R. Baldridge, Joseph H. Baldridge, Sparks, and C. Chipman, in the just and full sum of ten thousand dollars, for the faithful payment of which, our and each of ourselves, our and each of our heirs, administrators, and executors. In testimony of which we have hereunto subscribed our hands and affixed our seals (scrolls), this the 1st day of June, A.D. 1852.

The condition of the above bond is such, that whereas the said William M. Cook, Solomon Cunningham, Josiah R. Baldridge, Joseph H. Baldridge, Sparks, and C. Chipman, did, at the May term, A.D. 1852, recover and obtain a judgment or decree against said Albert T. Burnley and Levi Jones, dissolving an injunc-

tion granted, dismissing bill, and awarding execution for cost, in a cause wherein the said Albert T. Burnley and Levi Jones were plaintiffs, and the said William M. Cook, Solomon Cunningham, Joseph H. Baldridge, Sparks, and C. Chipman were defendants, pending in the District Court for the County of Harris; and said judgment or decree rendered at the said May term thereof, from which complainants gave notice of appeal. Now if the said complainants, Albert T. Burnley and Levi Jones, shall prosecute their said appeal with effect, and perform the judgment, sentence, or decree of the Supreme Court of the State of Texas, then this bond to be void, otherwise to have full force and effect.

A. T. BURNLEY,
By W. BALLINGER, [L. S.]
Attorney.
LEVI JONES,
By his Agent and Attorney in fact and law.
FLETCHER S. STOCKDALE,
H. B. MARTIN,
M. MENARD.

Witnesses to signature of Burnley, by attorney and Martin.
JOS. W. RICE,
M. M. PORTER.

Witnesses to signature.
M. B. MARTIN,
W. P. BALLINGER,
GUSTAVUS H. GUNN.

Witnesses to signature of Levi Jones, by attorney.
W. P. BALLINGER,
GEO. BUTLER.

Assignment of Errors.

Filed, October 23d, 1852.

F. R. LUBBACK,
Clerk.
By J. B. DART,
Deputy.

BURNLEY & JONES
v.
COOK and others.

In the District Court of Harris County.

In the above cause, the plaintiffs make the following assignment of errors.

1st. That the court erred in sustaining the motion of defendants to dissolve the injunction and dismiss plaintiffs' suit.

2d. The court erred in dissolving the injunction in said suit.

3d. The court erred in dismissing plaintiffs' suit.

4th. The court erred in rendering judgment for defendants.

5th. The court erred in sustaining the motion of defendant's appearing of record.

And for other causes apparent of record.

JONES & BALLINGER.

The State of Texas, County of Harris.

I, Francis R. Lubbock, clerk of the District Court, in and for the County and State aforesaid, do hereby certify that the foregoing thirty-eight pages of writing contain a full, true, and correct transcript of all the proceedings had in and by said court in a certain cause tried at the Spring term, A. D. 1852 thereof, wherein A. T. Burnley and Levi Jones were plaintiffs, and William M. Cook, James H. Baldridge, Josiah W. Baldridge, —— Sparks, —— Chipman, and Solomon Cunningham were defendants.

Given under my hand and seal of the court, at my office in the city of Houston, January 19th, 1853.

[SEAL.]

F. R. LUBBOCK,
Clerk.
By J. B. DART,
Deputy.

Bill of Exceptions, continued.

Also, the defendants introduced in evidence the mandate of the Supreme Court of said State in said last-mentioned cause, as follows:

Mandate.

The State of Texas.

To the District Court of Harris County, greeting:

Before our Supreme Court, on the 17th day of February, A. D. 1855, the cause upon appeal, to revise or reverse your judgment between A. T. Burnley and Levi Jones, appellants, and William M. Cook, Solomon Cunningham, Josiah R. Baldridge, Joseph H. Baldridge, —— Sparks, and C. Chipman, appellees, was determined; and therein our said Supreme Court made its order in these words: No. 384. "This cause came on to be heard on the transcript of the record of the court below; and the same being inspected, because it is the opinion of this court that there was error in the judgment of the court below: It is ordered, adjudged, and decreed that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court, and

appellees pay all cost of this cause in this court expended, and this decision be certified below for observance. Wherefore, we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed, and executed.

Witness, the Hon. John Hemphill, chief justice of our said Supreme Court, with the seal thereof annexed, at Galveston, this the 17th day of February, A. D. 1855.

[SEAL.]

THOMAS GREEN,
Clerk.

BURNLEY et al.
v.
COOK et al.

384. From Harris.

The proposition that an injunction will in no case be granted for the prevention of injuries to the plaintiff's freehold, or the enjoyment of his rights of property, where the defendant is in possession under an adverse claim of title, as insisted by counsel for the appellee, does not seem to be universally admitted. On the contrary, when the defendant was in possession of land which he claimed by an adverse title, and a suit was pending to try the title by law, an injunction was granted to restrain him from cutting timber and committing other waste (Shubrick *v.* Guerard, 2 Desaus. 616). It is true that an injunction will not be granted to restrain a mere trespass where the injury is not irreparable, or destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. It must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the injury is remediless, or not susceptible of pecuniary compensation or computation, to entitle a party to this preventive remedy (7 Johns. Ch. Rep. 315). The ancient doctrine of the Court of Chancery was not to interfere by injunction in cases of trespass, but to leave the party to his legal remedy. But the practice of the court is more liberal, and in cases of trespass it excepts a strong case of destruction or irreparable mischief (Eden on Injunctions, 231, No. 1, 3d edit.; Bonaparte *v.* The C. & A. Railroad Company, 1 Baldwin, 231–2). The practice (it is said) of issuing injunctions in cases of trespass, on the principle of irreparable mischief, has now become extremely common (Hansen *v.* Gardiner, 7 Sumners; Vesey, 305–6, note C.). An injunction may be granted to stay waste pending an action of law or a suit in equity to try the right (Att'y-Gen'l *v.* Norwood, 1 Belund, 581; Id. 582, and Id. 583). But an injunction will not be granted to stay waste or nuisance before a hearing on the merits, except in cases of urgent necessity, or where the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance (Charles River Bridge *v.* Warren Bridge, 6 Pick. 376). In all cases where the right is doubtful the court will direct a trial, and in

the meantime, if there be danger of irreparable mischief, or if there is any other good cause of granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings; and when the plaintiff's right is fully established, a perpetual injunction will be decreed (Ingraham *v.* Durnell, 5 Metcalf, 126; 2 Story's Eq. 925–6; 3 Daniell's Ch'y Pr. 1850, n. (1), 1st Am. edit.). It is a mistake, therefore, to suppose that an injunction will in no case be granted to restrain the commission of acts which may amount to trespasses, if committed under an adverse claim of title. Nor where a special injunction has been granted will it be dissolved, of course, upon the coming in of an answer in which the plaintiff's whole case is denied. The answer must not only positively deny the material facts which constitute the plaintiff's title to equitable relief, but the denial must be grounded upon personal knowledge of the facts, as the statement must be at least creditable (1 Dew. Eq. 429; 2 Dev. & Batt. 19; Eden on Inj. 140, n. (1)). The answer must not consist of statements of matters of law, but of matters of fact, which the defendant had the means of knowing to be true. "The weight of an answer (said Ch. Jus. Marshall, in Clark's Exrs. *v.* Vankrinsayk) must also, from the nature of evidence, depend in some degree on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion." (3 Cond. 325.) In Pen *v.* Carleton (3 Sumn. R. 70) Judge Story said, "The ground of the practice of dissolving an injunction upon a full denial by the answer of the material facts, is that in such a case, the court gives entire credit to the answer, upon the common rule in equity; that it is to prevail, if responsive to the charges in the bill, until it is overcome by the testimony of two witnesses, or one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say that a mere naked denial by a party who had no personal knowledge of the material facts, were to receive the same credit, as if the denial were by a party having an actual knowledge of them. In the latter case, the conscience of the defendant is not at all sifted; and his denials must be formed upon his ignorance of the facts, and merely to put them in a train for contestation, and due proof to be made by the other side."

"The sole ground upon which the defendant is entitled to the dissolution of an injunction upon an answer, is, that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff, to establish it. But what sort of evidence can that be which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims, but merely establishes that the defendant has no personal knowledge to aid it or to disprove." (And York *v.* Gregg, 1 Tea. R. 85–93.) Nor will an injunction be dissolved

where the defendant in his answer admits the plaintiff's equity; but sets up new matter of defence on which he relies in avoidance. (4 Johns. Ch. R. 497; 3 Daniels Ch. Pr. 1883, n.) There is a variety of cases analogous in principle to the present, in which injunctions have been granted. (See *supra*, and 2 Story's Eq. 951.) But it might be a matter of more difficulty to find cases in which they have been dissolved upon the coming in of an answer of the character of the present, consisting of the statement of matters of law, and matters of fact, of many of which it is not to be supposed the defendant had, or meant to be understood as having any personal knowledge, and new matter in avoidance. But it is not necessary to express a decisive opinion upon this branch of the case, as it is not necessary to its present disposition; and it is understood that the controversy between the parties as respects the injunction is now at an end. But we think it clear that the court erred in dismissing the case. The petition contains averments sufficient to maintain an action of trespass to try title; and if for no other purpose, it should have been retained for this. And whatever doubt there may be as to the granting or dissolving of the injunction, this, at least, seems quite too clear, to admit of doubt or controversy. The objection to the right of the District Court of Harris county to entertain jurisdiction of the case, is answered by the fact that the change of venue to that county was made on motion of the defendants, and by consent of parties. And though consent cannot give jurisdiction as respects the subject-matter of the suit, it may do so as respects jurisdiction over the person. (8 Tex. R. 122; 6 Id. 379.) The judgment is reversed and the case remanded.

WHEELER.

Feb. 17th, 1855.

The State of Texas, Supreme Court, at Galveston.

I, Thomas Green, clerk of the Supreme Court of the State of Texas, certify that the foregoing five pages and three lines contain a true and perfect copy from the record of the opinion of the court in the case No. 384, Burnley et al. *v.* Cook et al.

In testimony whereof, I hereunto set my hand, and affix the [L. S.] seal of said court at Galveston, this seventeenth day of February, A. D. 1855.

THOS. GREEN,
Clerk.
By CHAS. ROSIGNOL,
Deputy.

Bill of Exceptions, continued.

The defendant also introduced and read to the court the agreement of counsel as to the transcript by the Harris County Court, filed June 16th, 1859, which is as follows:

Agreement.

U. S. Court, Galveston.

BURNLEY and PORTER
v.
COOK and others.

Agreed in this case that the record in the Supreme Court of the case of Burnley and Jones against Cook and others, in the Harris District Court, together with a copy of the judgment of the Supreme Court therein, may be used in evidence by either party so far as material, the said case having stood continued by agreement, in the Harris District Court, since the filing therein of the mandate of the Supreme Court.

BALLINGER,
For Plaintiff.
M. A. DOOLEY,
For Wm. M. Cook, Defendant.

Bill of Exceptions, continued.

And also read to the court the motion to admit evidence of the want of jurisdiction in this court, which motion was filed on the 16th of June, 1859, and is inserted in full in bill of exceptions, number four, heretofore filed in this cause. And thereupon the defendants moved the court to submit the issue of fact to the jury, as to whether or not the said suit in the District Court of Harris *of Harris* County, was the same cause of action and the same defences therein made, and between the same parties, and their privies as to the present suit, which was objected to by plaintiffs; and the court having considered the said motion and evidence offered by defendant, and overruled the same, and refused to submit said question of fact (the identity of the said suit in Harris County District Court and the present suit, the same cause of action and defence, and between the same parties and their privies) to the jury. To which judgment and rulings of the court defendant by his counsel excepted.

Bill of Exceptions, continued.

Defendant also offered in evidence the certified copy from the General Land Office of the State of Texas, of the Abraham N. Gwatney land-warrant, and its approval by the Commissioner of Claims of said State, and a copy of the conveyance of said certificate through which defendant, William M. Cook, claims one hundred and seventy-nine and one-half acres of the land in controversy, and is as follows (which documents were read to the jury), marked P.

Document marked P.

Republic of Texas. No. 990. 960 Acres.

Know all men to whom these presents shall come, that Abraham M. Gwatney, having served faithfully and honorably for the term of eleven months, from the 10th day of January, 1837, until the 14th day of December, 1837, and being honorably discharged from the army of Texas, is entitled to nine hundred and sixty acres bounty land, for which this is his certificate. And the said A. M. Gwatney is entitled to hold said land, or to sell, alienate, convey and donate the same, and exercise all rights of ownership over it. This certificate shall be transferable by indorsement with a deed before any competent authority, with witnesses to the same.

In testimony whereof I have hereunto set my hand, this day of December 15th, 1837.

BERNARD E. BEE,
Sec'y War.

Approved, Austin, 14th July, 1846.

D. C. OGDEN,
Acting Adj't General, Republic of Texas.

I, Abraham M. Gwatney, Harrisburg county, do hereby assign unto William M. Cook, of the town of Houston, all my right, title, and interest in and to the within certificate, and the bounty land thereby to be held, as more fully appears by deed bearing equal date herewith, executed before Andrew Briscoe, chief justice of this county, and ex-officio a notary public.

Houston, Dec. 16th, 1837.

ABRAHAM M. GWATNEY.

Witnesses,
R. H. Hood,
Thomas H. Brown.

General Land Office, Austin, April 7th, 1859.

I, Francis D. White, Commissioner of the General Land Office of the State of Texas, do hereby certify that the foregoing is a true copy of the original now on file in this office.

[L. S.] In testimony whereof, I hereunto set my hand and affix the seal of said office, day and date above written.

FRANCIS M. WHITE, [L. S.]

Bill of Exceptions, continued.

Defendant also offered in evidence a certified copy from the land office of the State of Texas, of the deed from Abraham M. Gwatney of his, Gwatney's, land warrants to the defendant, William M. Cook, which certified copy was read to the jury, and is as follows, marked Q.

Exhibit referred to, marked Q.

Republic of Texas, County of Harrisburg.

Know all men by these presents that I, Abraham M. Gwatney, a citizen of Texas, and late a soldier in the army thereof, for and in consideration of the sum of one hundred and twenty dollars to me in hand paid, the receipt whereof is hereby acknowledged, have this day given, granted, bargained and sold, and do by these presents give, grant, bargain, sell, alien, and convey, and so far as the ability in me exists to deliver possession to William M. Cook of the county of Harrisburg, his heirs and assigns, nine hundred and sixty acres of unlocated land to me belonging, or to which I am entitled from the Republic of Texas for my services in the army, as set forth in the land certificate which is dated on the 15th day of December, 1837, and signed by the Honorable Bernard E. Bee, Secretary of War; which said certificate I have this day transferred on the back thereof, in writing, to the said William M. Cook, his heirs and assigns, as will more fully appear, reference thereto.

To have and to hold the aforesaid nine hundred and sixty acres of land and premises unto him, the said William M. Cook, his heirs and assigns, with all and singular the rights, privileges, and immunities to the same belonging or in any wise appertaining forever, in fee simple. And I authorize the said William M. Cook, his heirs and assigns, or such persons as he or they may institute and appoint to select, locate, and survey said land in any part of the Republic that he or they may think proper, and to demand and receive from the proper officer all orders of survey, warrants, patents, &c., which I am or may be entitled to by virtue of my services aforesaid, and to take and perfect thereto in his own name or in any name as the law may direct in such cases. And I, the aforesaid Abraham M. Gwatney, for myself, heirs, &c., the title to the aforesaid land and premises from the lawful claim or claims of all persons whomsoever, and from all incumbrances whatsoever, will, and do by these presents forever warrant and defend.

In testimony whereof, I have hereunto set my hand and affixed my seal at the city of Houston, in the county of Harrisburg, the 16th day of December, one thousand eight hundred and thirty-seven.

ABRAHAM M. GWATNEY.

Signed, sealed and acknowledged in the
presence of us, instrumental witnesses.
B. F. Hord,
Thomas H. Brown.

Republic of Texas, Harrisburg County.

Be it known that on the 16th day of December, in the year 1837,

before me, Andrew Briscoe, chief justice of the county, and ex-officio a notary public duly and commissioned and sworn, personally came and appeared the above named Abraham M. Gwatney, who before, and the witnesses signed with him, executed the above and foregoing deed, with a transfer indorsed on the original certificate therein described, as he declared for the purposes therein specified, and prayed that all faith and evidence might be given it as a notarial act.

Wherefore I grant these presents under my hand and the seal of the county, at Houston, the day and year aforesaid.

H. BRISCOE,
C. J. H. C., Ex-officio Notary Public.

GENERAL LAND OFFICE, AUSTIN, December 14, 1855.

I, Stephen Crosby, commissioner of the General Land Office of the State of Texas, do hereby certify that the foregoing is a correct copy of the original now on file in this office.

[SEAL.] In testimony whereof, I hereunto set my hand and affix the seal of said office, the day and date last above written.

S. CROSBY,
Commissioner.

Bill of Exceptions, continued.

Defendant also offered in evidence a certain copy from the General Land Office of the State of Texas, of the survey and field-notes of 179½ acres of land, the portion of the land in controversy claimed by defendant, made for William M. Cook, in virtue of the Abraham M. Gwatney land warrant, and the certificate and plat to the said field-notes attached, made by Henry Beaumont, county surveyor of Calhoun county, which were read and submitted to the jury, and is as follows, marked R.

Exhibit marked R.

William M. Cook. Survey for William M. Cook of $179\frac{5}{10}$ acres of land, situated on the S. W. side of Matagorda bay, and on the north margin of Powderhorn bayou, about three miles S. E. from the town of Indianola, county of Calhoun, district of Victoria,—it being part of the quantity to which he is entitled by virtue of land-warrant .990. Dated at Houston, December 15, 1839, issued to Abraham M. Gwatney, and by transferred to said Cook.

Beginning at a stake 1100 varas from the mouth of Powderhorn bayou, from which a double palmetto stands on the south end of the south mott (one of three motts), bears south 32° 45° W., and the north end of the north mott bears S. 47° west; thence down the bay, with its meanders, S. 52° E. 953 varas; thence south 35° east 157 varas, to the mouth of Powderhorn bayou, a post from which the

north point of the mouth of Powderhorn bayou bears north 23° east 63 varas; thence up the bayou, with its meanders, south 45° W. 114 varas; thence south 80° 30° west 141 varas, S. 74° 75° W. 410 varas, S. 37° 75° W. 295 varas, to Powderhorn or Fish lake, a post. Thence following the lake N. 45° W. 80 varas, S. 62° W. 205 varas, N. 83° 15 W., through salt marsh, 605 varas; thence N. 24° E. 485 varas, the mouth of a bayou; thence with bayou N. 17 E. 325 varas, to post on bank of bayou, from which the south end of north mott bears S. 45° W. 300 varas; thence N. 45° E. 600 varas to the place of beginning.

Surveyed May 15th, 1850.

PHILIP ECHELBACH,
MARTIN SLYMUND,
Chainmen.

I, Edward Linn, do solemnly declare, under the oath of my office, that the foregoing survey was made according to law, and that the limits, boundaries, and corners are truly described in the within plat and field-notes, and the survey made May 15th, 1850.

EDWARD LINN,
Surveyor Victoria District.

I certify that I have examined the foregoing plat and field-notes, and find them correct, and the survey made according to law.

VICTORIA, September 20th, 1850.

EDWARD LINN,
District Surveyor, Victoria District.

[For plat, see original, page 215.]

The State of Texas, County of Galveston.

I hereby certify the foregoing to be a correct plat, according to the county map of Calhoun county and the records of my office, being plat of survey of 179½ acres for Wm. M. Cook, assignee of A. Gwatney, in said county of Calhoun.

GALVESTON, January 20th, 1854.

HENRY BEAUMONT,
County Surveyor, Calhoun County.

GENERAL LAND OFFICE, AUSTIN, September 29th, 1853.

I, S. Crosby, commissioner of the General Land Office of the State of Texas, do hereby certify that the foregoing is a true copy of the original on file in this office, with the erasure.

[L. S.] In testimony whereof, I hereunto set my hand and affix the seal of said office, the day and date last above written.

S. CROSBY,
Commissioner.

Bill of Exceptions, continued.

Defendants also offered in evidence a certified copy. A location made by him, January 5th, 1847, upon the land, 179½ acres of which is claimed by him in this suit. Said location was made in virtue of bounty warrant, No. 990, which is the Abraham M. Gwatney land warrant. Said location, and the certificate of the land is as follows, marked S.

Exhibit marked S. Location No. 339. *January 5th*, 1847.

To the county surveyor of Victoria county, will please survey 320 acres on bounty warrant, No. 990, on Matagorda bay, at the mouth of Powderhorn bayou, on the northwest side, thence up the bay and back for quantity.

WILLIAM M. COOK.

I certify that the foregoing location, No. 339, to be a true copy taken from the book of entries of my office.

EDWARD LINN,
District Surveyor, Victoria County.

Victoria, January 28th, 1852.

Bill of Exceptions, continued.

The defendant also offered in evidence the deposition of Henry Beaumont, taken before mayor of Indianola, but the plaintiffs objected to said deposition, because the officer does not certify by whom said deposition was reduced to writing; the certificate does not show any sufficient notification to plaintiffs or their counsel, and said testimony is not competent. And the court sustained plaintiffs' objection to said deposition, and refused to permit defendants to read the same, to which ruling of the court the defendant, by his counsel, excepted. Marked T.

Exhibit marked T.

The United States of America, District of Texas, State of Texas, County of Calhoun.

Be it remembered, that on the fourth day of February, in the year of our Lord one thousand eight hundred and fifty-six, I, Henry H. Cleveland, mayor of the city of Indianola, county of Calhoun aforesaid, acting as a commissioner, duly appointed by the District Court of the United States for the District of Texas aforesaid, under and by virtue of the act of the Congress of the said United States, entitled "An Act for the more convenient of taking bail, and affidavits in civil causes, depending in the courts of the United States," passed

February 20th, 1812. And the act of the said Congress, entitled "An Act in addition to an act entitled 'An Act for the more convenient of taking bail and affidavits in civil causes depending in the courts of the United States,'" passed March 1st, 1817. And the act of the said Congress, entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did, at the request of William M. Cook, call and cause to be, and personally appear before me at the city of Indianola, in the county of Calhoun, and State of Texas, in the said district and State, Henry Beaumont, to testify, and the truth to say, on the part of the defendants, in a certain cause or suit now depending and undetermined in the District Court of the United States of America, held in and for said district and State of Galveston in the said State of Texas, wherein A. T. Burnley and Royal A. Porter are plaintiffs, and William M. Cook et al., defendants. And the said Henry Beaumont being of sound mind and lawful age, and having been by me first cautioned and sworn to testify, and the truth, whole truth, and nothing but the truth, in the cause or suit aforesaid, was carefully examined by me, and did thereupon depose, testify, and say as follows, that is to say:

That he is district surveyor of Calhoun county; that in the performance of the duties of his office, he has made various surveys of lands on the west bank of Matagorda bay, viz., of the tract of land marked on the county map of Calhoun county, in names of Juan Cano and of Benito Morales, and of sundry locations upon the said tracts; and also of the tract marked L. Gonzales.

That in making said surveys he has not been able to find any landmarks or calls, except the mot Artralga, named in the field notes of the Juan Cano league, a tree in said mot, marked (A). That he found on said tree various other marks and letters, and the date or figures 1852, which have the appearance of the same age as the said letter A. That the said call of the Artralga mot is the only one known to me in the different surveys of sixteen leagues, known in the county of Calhoun as the land of Burnley and Jones.

That by actual survey of said sixteen leagues of land, making said mot Artralga the beginning corner, the said sixteen leagues of land will not connect with each other, or with other surveys with which they have usually been supposed to connect, at some points from nine hundred to twenty-two hundred varas. That by making the commencement of survey to determine the sixteen leagues above referred to, connecting them with such other surveys as they are shown to connect with on the old maps of said county of Calhoun at other known corners; that said mot Artralga, the lower corner of said Juan Cano league, would be reached at a point not less than nine hundred varas, northwesterly from said mot Artralga, and the discrepancy at other points would be greater, in point of connection, than above-named.

That in the course of said surveys various noted landmarks, such

as bayous, lakes, and mots occur, which it is usual to note in field notes of surveys. Witness further states, that he is acquainted with William M. Cook and S. A. White; has seen them both write their names, and that their signatures to an article of agreement, for the division of lands, dated the 27th of August, 1846, are their genuine signatures. Said articles of agreement are attached to my deposition, heretofore taken and on file in said cause. Witness further states, from the records of his office, it appears that a survey of a portion of warrant 990, issued to A. M. Gwatney, was made on the 23d January, 1846, on land northwest of Powderhorn bayou. Witness further states, that the certified copy of entry of 320 acres, a portion of warrant No. 990, issued to A. M. Gwatney, at the mouth of Powderhorn bayou, hereto attached, is satisfied in part, by survey of 179½ acres, duly recorded in his office; the said 179½ acres exhausting the land not occupied by other previous locations called for, per said copy of entry or application.

HENRY BEAUMONT,
County Surveyor, Calhoun County.

And I, Henry B. Cleveland, mayor of the city of Indianola, and commissioner as aforesaid, do hereby certify, that the reason of taking the foregoing deposition is, that the testimony of the said witness is material and necessary in a civil cause or suit, in the caption of said deposition named; and that he lives in the city of Indianola and county of Calhoun, more than one hundred miles from the place where the trial of the said suit is to be had.

I further certify, that a notification of the time and place of taking said deposition was made, and served on F. S. Stockdale, Esq., counsel for the plaintiffs in said ———, as per agreement of counsel of both parties to said suit, as does fully appear from the certificate of D. M. Stapp, witnessed and attested by the seal of J. Ashworth, a notary public for the State of Texas, now in my possession.

I further certify, that on the day and year first above-mentioned, I was attended by the above witness; and that the above deposition having been first taken and read to him in his presence, he subscribed his name thereto, as above written; and that I have retained said deposition in my possession, for the purpose of sealing up, directing, and placing the same in the post-office, to be forwarded by mail to the clerk of the court for which the same was taken. And I do further certify, that I am not of the counsel or attorney for either of the parties in the deposition or caption named, nor in any way interested in the event of said cause or suit.

In witness whereof, I have hereunto set my hand and seal, using [L. S.] a scrawl for seal, on the day and year first above mentioned.

H. B. CLEVELAND,
Mayor.

Bill of Exceptions, continued.

Defendant read in evidence copy of location attached to said deposition of Beaumont, certified by Edward Linn, district surveyor, without objection, as follows:

INDIAN POINT, January 5th, 1847.

To the County Surveyor of Victoria County:

You will please survey 320 acres of land, on bounty warrant No. 990, on Matagorda bay, at the mouth of Powderhorn bayou, commencing at the mouth of Powderhorn bayou, on the northwest side, thence up the bay and back for quantity.

(Signed) WM. M. COOK.

I certify that the foregoing to be a true copy of the above entry, taken from the Application Book of my office.

EDWARD LINN,
District Surveyor, Victoria District.

INDIANOLA, May 16th, 1850.

The State of Texas, Victoria County.

Before me, James Ingram, notary public in and for the county of Victoria, duly commissioned and qualified, personally appeared Edward Linn, who is personally known to me, and acknowledged his signature to the within instrument of writing, being signed by him in his official capacity as district surveyor of Victoria District.

In testimony whereof I have hereunto set my hand and official [L. S.] seal, in office at Victoria, this the 28th day of April, A.D. 1851.

JAMES INGRAM,
Notary Public.

Bill of Exceptions, continued.

Defendant also offered in evidence the patent from the State of Texas, for 179½ acres of land, the same claimed by defendant in this case, issued to the defendant, William M. Cook, in virtue of the Abraham M. Gwatney land warrant, which was read to the jury, and is as follows, marked U.

Exhibit U.

No. 258. Vol. 8.

In the name of the State of Texas, to all whom these presents shall come, know ye, I, E. M. Pease, Governor of the State aforesaid, by virtue of the power vested in me by law, and in accordance with the laws of said State in such case made and provided, do by these presents grant to William M. Cook, assignee of Abraham M. Gwat-

ney, his heirs or assigns, forever, one hundred and seventy-nine and one-half acres of land, situated and described as follows: In Calhoun county, on the southwest side of Matagorda bay, and on the north margin of Powderhorn bayou, about three miles southeast from the town of Indianola, by virtue of bounty warrant No. 990, issued by Bernard E. Bee, secretary of war, to Abraham M. Gwatney, on the 15th day of December, 1837, and transferred to William M. Cook on the 16th day of December, 1837; beginning at a stake 1100 varas from the mouth of Powderhorn bayou, from which a double palmetto bears S. 45 W.; thence down the bay with its meanders, S. 52 E. 953 varas; thence S. 35 E. 157 varas, to the mouth of Powderhorn bayou, on a post, from which the north point of Powderhorn bayou bears N. 23° E. 63 varas; thence up the bayou with its meanders S. 45° W. 114 varas, S. 80° 30° W. 141 varas, S. 74° 15° W. 410 varas, S. 37° 15° W. 295 varas, to Powderhorn or Fish lake, a post; thence following the lake N. 45° W. 80 varas, S. 62° W. 205 varas, N. 83° 15° W., through salt-marsh, 505 varas; thence N. 24° E. 485 varas, to the mouth of a bayou; thence with bayou N. 17° E. 325 varas, to post on the bank of bayou; thence N. 45° E. 600 varas, to the place of beginning. Hereby relinquishing to him, the said William M. Cook, and his heirs or assigns, forever, all the right and title in and to said land, heretofore held and possessed by the said State; and I do hereby issue this letter *letter* patent for the same.

In testimony whereof I have caused the seal of the State to be affixed, as well as the seal of the General Land Office. Done at the city of Austin, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and fifty-seven.

[L. S.]

E. M. PEASE,
Governor.

[L. S.] S. CROSBY,
Commissioner of the General Land Office.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of Robert B. Moore, taken December 15, 1853, taken *de bene esse*, without notice, which, except parts rejected, was read to the jury.

Exhibit Z. Robert B. Moore's testimony.

That he is well acquainted with a survey made for William M. Cook, one of the defendants, by virtue of the Gwatney certificate; that the said land on which said survey was made lies on the Matagorda bay, and immediately northwest of and on Powderhorn bayou, in the lower part of which the present city of Indianola lies, in the

county of Calhoun, and State of Texas; that he knows Neill Carline, who was living on said land, near said bayou's mouth, where it empties into Matagorda bay; that said Carline first went on to said land in the fall of 1849, or perhaps in the winter; that in the spring, or perhaps on the first of June, the said Carline built a small house and inclosed a small garden; that he, witness, knows that said Carline was Cook's tenant; that he was present when Cook and Carline first came to an understanding about going on to said land, and frequently heard Carline acknowledge Cook to be his lessor, or that he was holding said place for Cook and as his tenant; that Carline had possession at one time of a lot of timber or wharf posts belonging to said Cook on said land, and kept them until carried off at high tide; that upon said Carline's leaving, Daniel Elam, of said county, now deceased, took possession of the land and house built by him, Carline, and built another house; that said Elam took possession of the same under and for Col. Cook, as witness understood from Elam.

* * * * * * *

That numerous other improvements have since been built by persons claiming under said Cook; that said Cook leased a portion of said land in 1851, in the month of March, to one Cunningham, who built a cattle-pen on the same and a wharf in said bayou, for the purpose of and did ship cattle therefrom; that he, said Moore, is well acquainted with the said Powderhorn bayou and bay, and knows the said bayou is seventy-five yards wide, or about that, and the average depth of the same is, say six to fifteen feet. Witness states further that said bay is about eight miles from the mouth of the bayou, at the head thereof, and will average in width at least two miles; that said bayou is navigable, and a very fine harbor for schooners and sloops, and river steamboats; that said bayou is navigable for sloop and schooner boats of small draft of water; that witness has been at the said bay and over it often, and has sounded the said bay, and found from three to four feet water on an average; that at about three miles from the bay of Matagorda he, witness, judges said bay of Powderhorn to be about three miles wide; that he, witness, has no interest, either direct or indirect, in the said survey of land made for said Cook, by virtue of said Gwatney certificate; and further he says not.

R. B. MOORE.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of Cornelius H. Vanderveer, taken *de bene esse*, without notice, which was read to the jury, marked C.

Exhibit C. Cornelius H. Vanderveer's Deposition.

That he is an old settler in the county; that he is well acquainted

with Powderhorn bayou, and has been since the year 1832. Said bayou empties into Matagorda bay on its west side, in the county of Calhoun, and State of Texas, and is the lower boundary of the present city of Indianola. He, witness, thinks Powderhorn bayou to be about sixty or seventy yards wide, having never measured it; supposes said bayou to be in depth six feet on an average. There has no change taken place in the width of said bayou since he first became acquainted with it, 1832. It has always been used since he knew it as a harbor for sloops, boats, and small schooners. The first time he saw it, in 1832, he was in it in a boat.

C. H. VANDERVEER.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of John W. Schwartz, taken December 15th, 1853, *de bene esse*, without notice, which was read to the jury, marked W.

Exhibit W. John W. Shwartz's Deposition.

That he is well acquainted with the land lying on the west margin of Matagorda bay, in Calhoun county, State of Texas, immediately above Powderhorn bayou, and for eleven hundred varas up the said bay, the same for which the survey was made, by virtue of the Gwatney certificate, for Colonel William M. Cook, one of the defendants. He knew Neil Carline very well, and knows that said Carline lived upon the said land near the mouth of said Powderhorn bayou, where it empties into said Matagorda bay; said Carline was the tenant of Colonel William M. Cook, as he, Carline, always stated, and as witness himself knew. Carline first settled upon the said land in the fall of the year 1849, as the tenant of said Cook, and for the purpose of holding the said land, as said Cook's tenant, as he, witness understood, both from Cook and Carline. That Carline built a small house on said land, and upon leaving the same, one Daniel Elam, as the tenant of Cook, moved on the same premises, and occupied the said house, and built another; afterwards, witness learned, Elam had bought said houses. He, Elam, built another house; who Elam bought from, witness does not know. He, witness ( ), lived in a short distance of the said land, with his father, but not upon said Gwatney survey. Witness further states that he is well acquainted with Powderhorn bayou and Powderhorn bay. That said bayou is navigable for schooners, sloops, and river steamboats, and is a very fine harbor for said crafts. That said Powderhorn is some eight miles from the mouth of the bayou to the head of the said bay, and in width from two to two and a half miles wide. That said bayou is navigable for small schooner and sloop boats, the average depth of the same being from three to four feet. He, wit-

ness, has sailed a Portuguese rigged boat up and in said bay, knows from having tried the depth of said bay at various places, that it is from three to four deep on an average. Witness has known said bay (Powderhorn Bay), since 1844, and does not think there has been any change in the width or depth of the same since that time. Witness knows that the bayou aforesaid is, on an average, five feet deep, having measured the same, that he thinks the width of the bayou is about seventy-five yards.

JOHN W. SCHWARTZ.

Bill of Exceptions, continued. Howerton Deposition. Exhibit Marked No. 4. Z.

He, witness, knows the land lying on the west side of Matagorda bay, and adjoining, and on the Powder bayou, at the extreme lower end of the city of Indianola, county of Calhoun, State of Texas. He was also well acquainted with Neill Carline, the tenant of William M. Cook, one of the above named defendants. That said Carline was, when he first became acquainted him, living on said land, near the mouth of said Powderhorn bayou; this was in the month of May or June, 1850. That said Carline lived on said land for some time, and when he left, one Daniel Elam took possession of the same, and held it until his death, in last summer or fall, say October, 1853.

The witness states further, that he believes Powderhorn to be some seventy or seventy-five yards wide, and that it is a navigable stream for small sailboats and river steamboats, and that the same is a very fine harbor for said crafts. Witness's sons were employed by a tenant of Cook's, in the spring of 1851, to build a cattle pen and wharf on said land. That he was occasionally about where they were at work, and was cited to appear and answer for contempt, &c. At the District Court of the United States at Galveston, at the instance of the agent of one of the plaintiffs, A. T. Burnley; but on answer filed, he, witness, was discharged, and further witness saith not.

JAMES HOWERTON.

Bill of Exceptions, continued.

In reading the preceding depositions of Robert B. Moon, John W. Schwartz, and James Howerton, the plaintiffs' counsel, objected to the following statements in said depositions, as evidence.

Of Robert W. Moore's Deposition.

"Witness knows that said Cook and his tenants have had continuous possession of said land since the fall of the year 1849 or early part of the winter, 1849 and '50, say December, 1849, and down to the present time."

with Powderhorn bayou, and has been since the year 1832. Said bayou empties into Matagorda bay on its west side, in the county of Calhoun, and State of Texas, and is the lower boundary of the present city of Indianola. He, witness, thinks Powderhorn bayou to be about sixty or seventy yards wide, having never measured it; supposes said bayou to be in depth six feet on an average. There has no change taken place in the width of said bayou since he first became acquainted with it, 1832. It has always been used since he knew it as a harbor for sloops, boats, and small schooners. The first time he saw it, in 1832, he was in it in a boat.

C. H. VANDERVEER.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of John W. Schwartz, taken December 15th, 1853, *de bene esse*, without notice, which was read to the jury, marked W.

Exhibit W. John W. Shwartz's Deposition.

That he is well acquainted with the land lying on the west margin of Matagorda bay, in Calhoun county, State of Texas, immediately above Powderhorn bayou, and for eleven hundred varas up the said bay, the same for which the survey was made, by virtue of the Gwatney certificate, for Colonel William M. Cook, one of the defendants. He knew Neil Carline very well, and knows that said Carline lived upon the said land near the mouth of said Powderhorn bayou, where it empties into said Matagorda bay; said Carline was the tenant of Colonel William M. Cook, as he, Carline, always stated, and as witness himself knew. Carline first settled upon the said land in the fall of the year 1849, as the tenant of said Cook, and for the purpose of holding the said land, as said Cook's tenant, as he, witness understood, both from Cook and Carline. That Carline built a small house on said land, and upon leaving the same, one Daniel Elam, as the tenant of Cook, moved on the same premises, and occupied the said house, and built another; afterwards, witness learned, Elam had bought said houses. He, Elam, built another house; who Elam bought from, witness does not know. He, witness ( ), lived in a short distance of the said land, with his father, but not upon said Gwatney survey. Witness further states that he is well acquainted with Powderhorn bayou and Powderhorn bay. That said bayou is navigable for schooners, sloops, and river steamboats, and is a very fine harbor for said crafts. That said Powderhorn is some eight miles from the mouth of the bayou to the head of the said bay, and in width from two to two and a half miles wide. That said bayou is navigable for small schooner and sloop boats, the average depth of the same being from three to four feet. He, wit-

ness, has sailed a Portuguese rigged boat up and in said bay, knows from having tried the depth of said bay at various places, that it is from three to four deep on an average. Witness has known said bay (Powderhorn Bay), since 1844, and does not think there has been any change in the width or depth of the same since that time. Witness knows that the bayou aforesaid is, on an average, five feet deep, having measured the same, that he thinks the width of the bayou is about seventy-five yards.

JOHN W. SCHWARTZ.

Bill of Exceptions, continued. Howerton Deposition. Exhibit Marked No. 4. Z.

He, witness, knows the land lying on the west side of Matagorda bay, and adjoining, and on the Powder bayou, at the extreme lower end of the city of Indianola, county of Calhoun, State of Texas. He was also well acquainted with Neill Carline, the tenant of William M. Cook, one of the above named defendants. That said Carline was, when he first became acquainted him, living on said land, near the mouth of said Powderhorn bayou; this was in the month of May or June, 1850. That said Carline lived on said land for some time, and when he left, one Daniel Elam took possession of the same, and held it until his death, in last summer or fall, say October, 1853.

The witness states further, that he believes Powderhorn to be some seventy or seventy-five yards wide, and that it is a navigable stream for small sailboats and river steamboats, and that the same is a very fine harbor for said crafts. Witness's sons were employed by a tenant of Cook's, in the spring of 1851, to build a cattle pen and wharf on said land. That he was occasionally about where they were at work, and was cited to appear and answer for contempt, &c. At the District Court of the United States at Galveston, at the instance of the agent of one of the plaintiffs, A. T. Burnley; but on answer filed, he, witness, was discharged, and further witness saith not.

JAMES HOWERTON.

Bill of Exceptions, continued.

In reading the preceding depositions of Robert B. Moon, John W. Schwartz, and James Howerton, the plaintiffs' counsel, objected to the following statements in said depositions, as evidence.

Of Robert W. Moore's Deposition.

"Witness knows that said Cook and his tenants have had continuous possession of said land since the fall of the year 1849 or early part of the winter, 1849 and '50, say December, 1849, and down to the present time."

Of John W. Swartz's Deposition.

"Further states, that since the fall of the year 1849, the said Cook, by his tenants and those holding under him, has had continuous possession of said lands; that said possession he knows to have been continuous."

Of James Howerton's Deposition.

"As the tenant of Cook, as witness understood, that witness knows that said Cook, by himself and his tenants, held possession continuously ever since the month of May or June, 1850."

On the following grounds:

First. That said witnesses swear to conclusions of law, and not to matters of fact.

Second. That the said testimony of said witnesses is general, loose, and indefinite; does not give names of persons, dates, and times, and show the facts in their own minds constituting tenancy and possession.

Which objections of plaintiffs' counsel were sustained by the court, and the said parts of said depositions were ruled out by the court; to which ruling of the court, the said defendant Cook, by his counsel, excepted.

Bill of Exceptions, continued.

Defendants also read in evidence the deposition of Charles A. Harper, taken December 15th, 1853, *de bene esse*, without notice, as follows:

Exhibit marked No. 2, Z. Charles A. Harper's Deposition.

That he has been sued as one of the defendants in the above-named causes; but that he has no interest in any of the land claimed in plaintiff's petition. That at one time, he did own a portion thereof, but that he has sold all interest, and conveyed the same away by quitclaim deeds, so that he has no interest; and here disclaims having any to the land in dispute. He, witness, further states, that some two years since or more, he became the purchaser of lot number three, in block number seven, according to Smyth's map of Brown's addition to Indianola; that said lot lies near the mouth of Powderhorn bayou, where it empties into the west side Matagorda bay. Witness knows the same to be on the tract of land fronting on said bay 1100 varas, and back for quantity; surveyed for Col. William M. Cook, one of the defendants in this case, by virtue of the Gwatney certificate. He, witness, bought said lot of land of said Cook; deed was drawn to his, witness's, wife; and some seven or eight months since, sold the same to Daniel Elam, since deceased; deed made through one Rhu-

ner, to save the repeating of wife's signature and acknowledgment, other property being sold at the same time. This lot was the same identical lot on which Neal Carline had a cabin, and lived some years; said cabin yet remains on said lot, though improved somewhat by said Elam. He, Elam, built a small grocery on said lot, which, together with said cabin built by Carline, have been in use ever since. These improvements were made by witness some two years; at any rates, prior to the commencements by Baldridge, Sparks & Co. Said Elam took possession of said lot under or as purchaser from Col. Cook. They, Elam and Cook, had some contract in writing, by which they were bound to do certain things each. The contract will prove itself. Witness does not recollect its purport.

C. A. HARPER.

The defendant also offered in evidence the deposition of S. D. Clark, with receipt of Carline, which is as follows (which were read to the jury, the receipt being read as evidence that said receipt was executed):

Exhibit Y. The Deposition of S. D. Clark, and a Receipt from Neal Carline to Cook attached.

The receipt of Carline to Cook, hereto annexed, was signed by Carline in my presence; and subscribed the same, as a witness, on the day of its date. This is the document referred to in my general examination. Carline had been residing at Powderhorn all of two years before, acting as the agent of William M. Cook, taking care of a lot of logs, pens, &c. It was necessary to guard them against burning by persons loading there, or of being washed away by the tides.

Cross-examined.

The logs that I saw, and which were claimed by William M. Cook, were lying on the bank of the Powderhorn bayou. They were there all of one year, before the date of the receipt above referred to. There was also a cattle-pen and fences there. The cattle-pen was built about the spring of 1850. The receipt was read to me at the store of White and Southerland; and I believe the date, the 20th of August, 1851, to be correct. It was signed by Carline in my presence, as before stated; and I witnessed the transaction.

S. D. CLARK.

Receipt referred to, and attached.

Received, Indianola, August 20th, 1851, of William M. Cook, ten dollars in full for the house at Powderhorn bayou, which I built

on the Gwatney location, said Cook assigned with the improvements made by me as said Cook's tenant thereon. As witness my hand this day and date above written.

NEAL CARLINE.

Witnesses,
S. A. CLARK,
JOHN HENRY BROWN.

Bill of Exceptions, continued.

The defendant also offered in evidence the deposition of Jose Gamana, a citizen of Mexico, taken *de bene esse*, without notice, at Brownsville, on the 27th day of January, 1859, marked Z., which was read to the jury.

Exhibit Z. Jose Gamana's Deposition.

That he is a citizen of Mexico, and has resided *and has resided* in the city of Metamoras, in the State of Tamaulipas, for twenty-eight years last past, that he has known Leonardo Mauro the whole of said time, that during the whole period of twenty-eight years last past he knows that said Leonardo Mauro has been a citizen of the Republic of Mexico, has been domiciliated in the city of Metamoras aforesaid, during the whole of said period of time, and that during said time, he the said Mauro has received the rights of a citizen of Mexico, in voting at elections, and in holding the office of Prefect of the District of Metamoras a portion of said time, which district embraces all that part of Tamaulipas, fronting on the Rio Grande and extending southward so as to embrace San Fernando, which lies some ninety miles distant from Metamoras. The said Mauro is now absent from Metamoras, at Tampico, in said State of Tamaulipas.

JOSE GAMANA.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of Henry Clay Davis, taken *de bene esse*, without notice, which was read to the jury, and is as follows:

Exhibit H. Clay Davis's Deposition.

That he knows one Leonardo Mauro, and has known him since the year 1835 or 1836, that said Mauro now resides in the city of Metamoras, in the Republic of Mexico, and has always resided there since I first knew him (and that I have always understood and believed that he resided there many years before my acquaintance with him), and that he has not resided in De Leon's colony in the State

of Texas, or east of the Rio Grande, within the present limits of Texas, since the declaration of independence of the late Republic of Texas; that said Leonardo Mauro is a Spaniard by birth. He further deposeth, that he is personally acquainted with Jose Maria J——— Caravahal, and that he also knew the late Fernando De Leon, now deceased, who was, at and before his death, a resident of Victoria county, in said State of Texas; that said Caravahal was a brother-in-law of said De Leon.

H. CLAY DAVIS.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of John D. Wright, taken December 7th, 1853, without notice, which is as follows, marked O., which was read to the jury.

Exhibit O. John D. Wright's Deposition.

That he knows Leonardo Mauro; about the year 1833 or 1834, he was on the Lavacca river; he was a Spaniard. Knew him in 1835; he went to the States; since then knows he was on the Rio Grande about Metamoras. He, witness, has been since the year 1828 a citizen of De Leon's colony, was well acquainted with all of the colonists and knew no such colonist as Juan Cano or Benito Morales. Feels certain there was no such colonist in De Leon's prior to 1836, as he must have known them had there been any such. There might have been and probably was such persons as Juan Cano, and Benito Morales, Mexican peons, that passed through the country, but as before stated, witness is very positive there never was any such colonist or person that ever lived in De Leon's colony. Martin De Leon, the empresario, witness states he was well acquainted with up to his death, which was in the year 1834, with the cholera. That after that time there was no empresario empowered to act, or grant lands, to his, witness's, knowledge, and further witness saith not.

JOHN D. WRIGHT.

Bill of Exceptions, continued.

Defendant who offered in evidence the deposition of Margaret T. Wright, taken January 17th, 1856, without notice, which was read to the jury, and is as follows, marked N.

Exhibit N. Margaret T. Wright's Deposition.

I am acquainted with the defendant White, only; I do not know the plaintiffs; I have some acquaintance with L. Mauro; I got ac-

quainted with him in the year 1835, at Victoria, where he stopped a short time; he was then on his way to Eastern Texas with stock to sell or trade; he was ordered to leave Mexico on account of his being a Gauchapin, or, in other words, a *a* foreigner; he had his family with him, and also his peons, or servants. After leaving Victoria he, with his family and servants, proceeded to the State of Louisiana. I saw him in Louisiana in the year 1836, when I visited that State. Leonardo Mauro told me he had purchased a place, and was living on it; I was at his house; he never was a citizen of De Leon's colony, and did not pass through Texas with any intention of stopping to settle in any portion of Coahuila and Texas. Juan Cano never was a citizen of Texas; I was well acquainted with all the early settlers of De Leon's colony; Benito Morales never was a citizen of any of the western colonies; my early settlement, on the first day of March, 1825, in De Leon's colony, enabled me to know all the settlers, and I continued *and I continued* a resident up to the year 1836, when I visited the State of Louisiana. About one year ago Edward Linn came to me, and asked if I recollected certain citizens of De Leon's colony, naming Juan Cano and Benito Morales; I told him I knew all the citizens of the colony, and that no such men as Juan Cano and Benito Morales ever did live in the colony, and never was citizens; I returned to Victoria in the year 1837, and in the year 1838 the said L. Mauro, in company with the De Leon's and J. M. Carvajahal, went from Louisiana to the town of Soteo Marino, in the State of Tamaulipas, Mexico; I have not seen him since.

MARGARET T. WRIGHT.

Bill of Exceptions, continued.

Defendant offered in evidence the deposition of George W. Garnet, clerk of the County Court of Victoria county, which was read to the jury, marked (M).

Exhibit M. Deposition of Geo. W. Garnet.

I, George W. Garnet, and clerk of the County Court of Victoria county, I have made diligent search in the records of the said County Court of Victoria county, and can find no record of any grant of the government of Coahuila and Texas of any land to Juan Cano, bordering upon Matagorda bay, nor any title to Benito Morales for land upon the said bay, and no such grant has ever been recorded in the records of said Victoria county, and further deponent saith not.

G. WM. GARNET.

Bill of Exceptions, continued.

Defendant also offered in evidence the deposition of Thomas Hanson, which is as follows, marked L, which was read to the jury.

Exhibit L. Deposition of Thomas Hanson.

I am sixty-eight years of age; I reside in Calhoun county, and have so nearly twenty-six years, that is, in the territory now comprising Calhoun county; I am acquainted with Levi Jones, by sight only; I am acquainted with S. A. White, Esq., and with Col. Wm. M. Cook. The first settlers within the present limits of Indianola (then called Indian Point) was a Mr. Larch, who came from France, and was formerly from Louisiana; he came down (about) 1833; his wife died here, and then he left and went back to Louisiana, and has not been seen by me since. Mr. White (S. A. White) was the next settler who occupied the same house that Larch had previously occupied, about 1834; at that time there was no other person near, and horses, cattle, &c., were running wild here; I was then pilot at the pass Cavallo; and in Matagorda bay I never saw a Mexican, nor any one but Americans residing on the place, or near it, and Carauchua Indians occasionally; the Mexicans were afraid to come down because of the Indians; I do not know what colonists De Leon had above; but Juan Cano, or Boneto Morales, nor Leonardo Mauro, nor any such persons were ever here, and there was never any sign of settlement here before Larch built the house he and White lived in; I knew Mrs. Margaret T. Wright who was residing in De Leon's colony; from the time I first knew her she was in the habit of going around among the people and engaging their hogs when they were fattened; she used to drive them down into Mexico and sell them, sometimes several hundred head at a time; she was an active, intelligent woman, and a very useful woman; I knew Joseph M. Carvajahal, first about 1834, or soon after; he married a daughter of Martin De Leon, and left the country (about) 1836.

I knew Mr. Eleazer Kilpatrick and J. H. Beck, who resided on the beach between Indian Point and Powderhorn bayou (now Indianola), about the years 1842 and 1843. The place called Carlos Haven, is now in the corporate limits of Indianola, or lies north of Powderhorn bayou, between the bayou and Indianola. Indian Point in the bend. I never saw any Mexican survey land. It was the report and commonly stated, that they never used chains or actual measurement, but measured by the trotting of a horse. A certain time was allowed to trot off a league; and fast trotting horses were best, as they could trot around a longer tract than a slow horse, in time allowed for a league. I sailed into Powderhorn bayou first in the early part of the year 1832, in my pilot-boat. I gave it the name of "Powderhorn," because of the circumstance of finding on its banks a spoon and a powderhorn; and as the form of the bayou, in its meanders, was more like the horn than the spoon, I called it Powderhorn. I found two fathoms water inside the bayou, and about seventy-five yards wide. To all of which I solemnly swear, so help me God. The words, "was the next settler," embraced in the first

line of the third page, and read and approved by me as interlined, before signed.

T. HANSON.

Bill of Exceptions, continued.

Defendant also offered in evidence the order of survey, as follows: It is an exhibit to Henry Beaumont's return to the order of survey, and marked A. Also, defendant offered in evidence the notice to plaintiff, and his acknowledgment of the same, that the survey would be made, in pursuance to said order of survey. It is as follows: It is Exhibit C. to Beaumont's return. Defendants also offered in evidence, the full notes contained in the grants of Juan Cano and Benito Morales, as agreed upon by plaintiffs and defendants, and are as follows: They are Exhibit B. to Beaumont's return to the order of survey. Defendants also offered in evidence, the return of Henry Beaumont, county surveyor of Calhoun county, to the said order of survey, with the field-notes of surveys of said grants to Juan Cano and Benito Morales, and of locations and surveys, &c. It is marked K., all of which were read to the jury. Insert marked "Beaumont." There being three of said maps, agreed that one of the originals may be sent up as part of the record.

Exhibit referred to above.

ALBERT T. BURNLEY *v.* MOORE & SIEBALD.	No. 220.
THE SAME *v.* SAMUEL A. WHITE et al.	No. 213.
BURNLEY & PORTER *v.* WILLIAM M. COOK et al.	No. 441.

On this sixth day of January, A.D. 1855, came the parties aforesaid by their attorneys, and thereupon came on to be heard the motion of the said defendants, filed February 27th, 1855, to appoint a surveyor in this case; upon consideration thereof, it is now here ordered, that the district surveyor of Calhoun county be, and he is hereby appointed surveyor in this cause. And it is ordered, that he go upon the Morales and Juan Cano grants, described in the plaintiffs' petition, and make a survey of the said grants, and also of all the locations and surveys made upon the said grants, under which the said defendants claim, as either of the said parties may direct; first having given at least ten days' notice to the said parties or their attorneys,

of the time of commencing the said surveys, and that he return to this court three plots of the said grants, locations, and surveys, describing the true and accurate boundaries thereof, duly certified, on or before the first Monday of January next.

The foregoing is a true copy taken from the minutes of the District Court of the United States for the District of Texas, at Galveston, I certify.

Witness my hand and the seal of said court, this 18th day of April, A.D. 1855.

[L. S.]

JAMES LOVE,
Clerk.

The Notice, Exhibit C., referred to above.

ALBERT T. BURNLEY *v.* MOORE & SIEBALD.	}	220.
THE SAME *v.* SAMUEL A. WHITE et als.	}	213.
BURNLEY & PORTER *v.* WILLIAM M. COOK et als.	}	441.

MESSRS. BALLINGER AND JONES, attorneys for plaintiffs.

You will take notice that the undersigned, one of the defendants in this cause, in accordance with an order of the honorable District Court, of the United States for Texas, dated 6th January, 1855, and filed February 27th, 1855, in pursuance of which said defendant on the 5th day of May next, 1855, will proceed with the district surveyor of Calhoun, named in said order, to make the said surveys as stipulated therin, with the plats, &c., upon the located Juan Cano and Morales grants, also the locations of the said defendants, with a re-survey and plat of the same, showing the boundary and conflict, if any, with said grants of said Cano and Morales, claimed by plaintiffs.

INDIANOLA, April 24, 1855.

The above notice is respectfully submitted for the consideration of the attorneys of the said plaintiffs, residing in Galveston.

WILLIAM M. COOK,
For himself.

Notice of the above received and acknowledged, April 26th, 1855.

WILLIAM P. BALLINGER,
Attorney for Plaintiffs.

Exhibit B., referred to above.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als.

Field-notes of the Juan Cano grant, as set forth and described in plaintiff's petition.

The land surveyed for Juan Cano, is situated on the west bank of the "Laguna Madre," of Matagorda, beginning at a stake on the bank of said laguna, the same being the third and last landmark of the league surveyed for Santiago Gonzales, and first of this survey; thence to the south 45° west, with the line of the said Gonzales, at 240 varas, there is a "mola," called Artiaga, where stands a stake, from which to the east, two varas distant, there is a hackberry, marked with letter A., being six inches diameter, thence following the same line south 45° west 7090 varas, to a stake in the prairie, which serves as a second landmark for both surveys; thence to the north 45° west, to the lower line of Faustino Alvarado, 7600 varas to a stake in the prairie, being the third landmark of this survey and of that of the said Alvarado; thence north 45° east 5140 varas to a stake set on the bank of said laguna, for the fourth and last landmark of this survey, and thence following the meanders of the laguna to the beginning point, completing an area of forty-six millions of square varas, equal to one league of pasture, in consequence of being at least, in its one-half, occupied by salt bays, and at the same time wanting timber and fresh water, its configuration being as in duplicate map, &c.

Field-notes of the Benito Morales grant as set forth in the plaintiff's petition.

ALBERT T. BURNLEY
v.
SAMUEL A. WHITE, WILLIAM M. COOK et als.

One league of land situated and lying on the lagoon of Matagorda, on the western margin, and bounded as follows, to wit: Commencing at a stake on the deep break of said lagoon, being the fourth and last landmark of the sitio surveyed for Juan Cano, and the first of this survey; thence south 45° west with the line of said Cano, 5140 varas to the third landmark of the aforementioned Cano and Faustino Alvarado, and following the said line with the depth of Alvarado, 3521 varas to the second landmark of the aforesaid Alvarado, and third of the sitio surveyed for Pedro Garcia; thence with the same line to the depth of Clito Garcia to the second landmark, and third of Pedro Garcia, the line running 3537 varas; thence following the

said line with the depth of the aforementioned Pedro Garcia, two hundred and sixty varas, where a stake was driven at the plain for the second landmark of this survey; thence north 45° west 4880 varas, where another stake was driven in the plain for the third landmark of this survey; thence north 45° east 8426 varas, to the third landmark of Don Francisco Leon, and it serves for the fourth landmark for this survey; thence south 45° east with the depth of said Leon 2850 varas, to the second landmark of the aforementioned Leon, which serves as the fifth landmark of this survey; thence with the line of the aforementioned Leon, north 45° east 4687 varas, to the first landmark of said Leon, which is the sixth and last landmark of this survey, being a stake driven upon the bank of the aforementioned main lagoon, and south forty-five west at the distance of seventy varas, there is a chain well, called John McKenney's well, thence following the bend of the lagoon to the place of beginning.

The above are the field-notes contained in the grants to Juan Cano and Benito Morales (E. E.), and survey may be made on same accordingly.

W. P. BALLINGER,
Attorney for Burnley.
F. H. MAUMAN & L. A. THOMPSON.
For Defendants.

Exhibit K., referred to above.

Field-notes of survey of grants, of Juan Cano, and Benito Morales, and of location and surveys thereon.

The State of Texas, County of Calhoun.

Pursuant to an order of the District Court of the United States, for the District of Galveston, issued 18th of April 1855, in the cause of Albert T. Burnley *v.* Moore and Siebald, same against Samuel A. White et als., and Burnley and Porter *v.* William M. Cook et al., filed herein and marked A., with copy of field-notes approved by attorneys of the parties, marked B.

I, Henry Beaumont, district surveyor for the county of Calhoun, notice having been given to parties concerned, as required therein by document marked C., filed herewith, make the following return of surveys, field-notes and plats, in triplicate in accordance thereto, of the various grants, locations and surveys, contemplated in the order aforesaid.

Commenced at a stake on the west side of the bay of Matagorda, on the lands known on the map of Calhoun county as the Juan Cano grant; on the south bank of Powderhorn bayou, at its mouth, whence the wreck of the steamship Portland bears north 51¾ east; east corner of Moore's house on opposite side of the bayou bears N. 53¼ E. about 180 varas.

Thence south, 53¼ E. 3380⅔ varas, to a stake on lower line of said Juan Cano grant; thence N. 45° E. 194½ varas, to bank of the bay of Matagorda, for the east corner of this survey, which is also the north corner of a survey, in the name of Simon Gonzales. Thence south 45 west, with the line of said Gonzales, 236 varas, the "mot" called Artalgia, a stake, from which to the east two varas distant, is a hackberry six inches in diameter, marked A.

Thence following the same line south 45° west, 7090 varas, to a stake in the prairie, for the south corner of the survey for Juan Cano, and the west corner of Gonzales.

Thence south 45 east, 6940 varas, to a stake on bank of Puren bayou, for the south corner of Simon Gonzales, and east corner of Faustino Alvarado, to south corner of Juan Cano, ran N. 45° W. 960 varas, to a slough, or head of branch of Powderhorn bay, following the said branch on same course N. 45° W. to its mouth, 300 varas wide; at 2840 varas, set stake on mouth of Powderhorn bay; crossed said bay 3180 varas wide, at 6020 varas, set stake on marsh of opposite side; on same course N. 45° W. 7260 varas, the north corner of Faustino Alvarado, at 7600 varas; set stake on prairie for west corner of this survey, for Juan Cano.

Thence N. 45° E. 5140 varas, for north corner of this survey, in a lake about 500 varas wide, and 1400 varas in length, a stake (mark made by Thulepapa in his evidence) to bay shore of Matagorda bay, is 1300 varas, N. 45° E. to intersection of lower line of a survey of 640 acres, for Thomas Wilson, 535 varas S. 45° E.

Thence south 65¼ E. 4420 varas, shown by dotted lines on plats to mouth of Powder bayou, on its north side.

Thence south 62¼ east across said bayou, 126 varas, to place of beginning, containing an area of forty-eight millions, six hundred and sixty-five thousand, four hundred and fifty (48,665,450) square yards, or 8613¾ acres.

Survey of Powderhorn Bay and Bayou, as connected with the grants of Juan Cano and Benito Morales.

Commenced at a point whose southwest line of Juan Cano survey strikes said bay of Powderhorn, a stake 284 varas N. 45° W. from said Cano's south corner, thence N. 45 E. 100 varas, N. 35 E. 980 varas, N. 67 E. 460 varas, N. 39¾ E. 1200 varas, N. 16½ E. 1050 varas, N. 71½ E. 1280 varas, N. 76½ E. 340 varas, N. 79½ E. 400 varas, N. 56½ E. 340 varas, N. 70¼ E. 640 varas, N. 17½ E. 100 varas, crossing a small bayou, a branch of Powderhorn bay, 5 varas wide, N. 77 W. 400 varas, S. 75 W. 400 varas, N. 81 W. 160 varas, N. 18¼ E. 340 varas, N. 19½ W. 160 varas, N. 59¾ W. 477 varas to entrance of bayou in Powderhorn bay, N. 35 E. 350 varas, S. 56 E. 280 varas, N. 59½ E. 160 varas, N. 34 E. 101½ varas to stake at the mouth of Powder bayou, whence wreck of the steamship Port-

land bears N. $51\frac{3}{4}$ east. East corner of Morris house, on opposite side of bayou, N. $82\frac{1}{2}$ W. about 180 varas, crossed bayou N. $62\frac{1}{4}$ W. 126 varas; thence S. 45 W. 114 varas, N. $80\frac{1}{2}$ W. 141 varas, W. 180 varas, S. $37\frac{1}{4}$ W. 2950 varas, to entrance of bayou into Powderhorn bay, N. 26 W. 95 varas, S. 62 W. 205 varas, N. $82\frac{1}{4}$ W. 605 varas, to edge of Powderhorn bay, N. 24 E. 485 varas, N. 22 W. $119\frac{3}{4}$ varas, to stake on edge of bayou, a corner of survey of $179\frac{1}{2}$ acres for Abraham M. Gwatney, S. 45 E. 600 varas, from edge of Matagorda bay.

Thence S. 45 W. across bayou 300 varas wide; at 400 varas a stake on salt marsh of Powderhorn, a corner of survey of 320 acres for D. N. White.

Thence S. 65 W. 700 varas, S. $71\frac{1}{2}$ W. $410\frac{1}{100}$ varas, to corner of survey of $140\frac{1}{2}$ acres, for A. M. Gwatney, same course, S. $71\frac{1}{2}$ W. at 612 varas, N. $76\frac{1}{2}$ W. 540 varas, S. $35\frac{1}{2}$ W. 684 varas, $36\frac{3}{4}$ W. 774 varas, S. 65 W. 140 varas, to corner of survey of 960 acres for J. Callighan, S. 63 W. 280 varas, S. $60\frac{1}{2}$ W. 980 varas, N. $84\frac{1}{2}$ W. 540 varas, to southwest line of Juan Cano survey, same course, at 1360 varas, N. $66\frac{1}{2}$ W. 960 varas, to a stake on line of B. Morales' survey on the salt marsh of Powderhorn bay; thence with said line of Morales S. 45 W. across said bay of Powderhorn 710 varas; thence S. 19 east 600 varas, S. $63\frac{1}{4}$ E. 760 varas, to mouth of Powderhorn bay, 60 varas wide, S. $25\frac{1}{4}$ W. 780 varas.

S. $55\frac{1}{2}$ W. 600 varas, S. 20 G. 280 varas, S. $78\frac{1}{4}$ W. 400 varas, N. 87 W. 300 varas, S. 34 west 680 varas, S. $75\frac{1}{2}$ W. 560 varas, S. $55\frac{1}{4}$ W. 220 varas, S. $74\frac{1}{2}$ E. 240 varas, S. $9\frac{1}{2}$ W. 100 varas, S. $41\frac{1}{2}$ W. 260 varas, S. $88\frac{1}{2}$ W. 200 varas, N. $42\frac{1}{4}$ W. 820 varas, at 700, is the lines of Morales.

N. $30\frac{1}{2}$ W. 540 varas, N. 86 W. 320 varas, N. 45 W. 140 varas, S. $38\frac{1}{2}$ W. 460 varas, S. 85 W. 280 varas, N. 83 W. 140 varas, S. 28 W. 280 varas, S. $76\frac{3}{4}$ W. 300 varas, to Powderhorn bayou, twenty varas wide, at its entrance into small lake, 300 varas wide, being the point at which southwest line of B. Morales' survey also crosses said bayou by plats, herewith accompanying as the result for the survey of Juan Cano grant, total area within lines of survey, 48,665,450 square varas, $8613\frac{78}{100}$ acres. On the south side of Powderhorn bay, 21,251,398, $3761\frac{50}{100}$ acres. North, 13,616,400, $2412\frac{10}{100}$ acres superficies; of Powderhorn bay and bayou in said grant, 13,797.65½, $2440\frac{18}{100}$ acres. Powder bayou, from the bar at its mouth to Matagorda bay, with three to three and a half feet water to its entrance into Powderhorn bay; thence Powderhorn bay affords four to four and a half feet to its west end, from which westwardly through the bayou and small lakes, there is depth of three to three and a half feet water as far as the lines of Cano and Morales' grants extend.

Survey of Grant of Benito Morales.

Began at north corner of Juan Cano survey, a stake in small lake, about 500 varas wide and 1400 varas in length to bay shore of Matagorda bay is 1300 varas, N. 45 east to intersection of lower line of a survey of 640 acres for Thomas Wilson, is 535 varas, S. 45 E. —— varas, S. 45 W. 5140 varas, the west corner of Juan Cano survey 5940 varas to a stake on salt marsh of Powderhorn bay, 6650 varas across said bay, 710 varas wide, at 10,800 varas, a small lake or expansion of Powderhorn bayou 300 varas wide, 12,458 varas; a stake in prairie for south corner of this survey of B. Morales; thence N. 45 W. 1440 varas to Powderhorn bayou, 20 varas wide at its entrance into a small lake 300 varas wide; thence along the bank of said lake and cutting said lake 560 varas; at 1900 varas a point on high prairie on same course N. 45 W., at 4880 varas to a stake on prairie for west corner of this survey.

Thence north 45 east 8456 varas for fourth corner of this survey; thence south 45 E. 2850 varas, a stake in the prairie for the fifth corner of this survey; thence N. 45 east 4687 varas, for last corner of this survey a stake at edge of prairie on salt marsh or lagoon, N. 45 east across said lagoon and marsh 900 varas, a shell ridge 320 varas wide, a salt marsh or lagoon 160 varas wide, at 1415 varas, same course, a stake at edge of bay of Matagorda. To intersection of upper line of survey of 640 acres for Fielding Jones is S. 45 E. 634 varas. Thence from last corner aforesaid this survey along the marsh or lagoon to place of beginning, containing fifty millions four thousand one hundred and ninety (50,004,190) square varas.

Survey of 179½ *Acres for A. M. Gwatney.*

Begin at a stake 1100 varas from the mouth of Powderhorn bayou on its north side, thence S. 52 E. 953 varas, S. 35 E. 157 varas to mouth of said bayou; thence S. 45 W. 114 varas, N. 80½ west 101 varas, W. 180 varas, S. 37½ W. 295 varas, to entrance of said Powderhorn bayou into Powderhorn bay, N. 26 W. 95 varas, S. 62 W. 205 varas, N. 82½ W. 605 varas, N. 24 E. 485 varas, N. 22 W. 119¾ varas to a stake on edge of bayou, whence south of north mot (one of three mots), bears S. 45 W. about 300 varas; thence N. 45 E. 600 varas, to edge of bay of Matagorda, S. 8¾ to 12½ varas to place of beginning.

Survey of D. N. White, 320 *Acres, referred to above.*

Begin at upper corner of A. M. Gwatney's for 179½ acres; thence N. 54° W. 1350 varas, to a post whence lignum viti, six inches in diameter, marked X, bears S. 54 W. 105 varas; thence south 45 W. 795 varas, a bayou 50 varas wide, at 1325 varas, a post in the prairie

for west corner of this survey. Thence S. 45° E. 700 varas, S. 85° E. 865 varas; a post on salt marsh of Powderhorn bayou, N. 45° W. across bayou, 300 varas wide, 400 varas to a stake in edge of said bayou, a corner of A. M. Gwatney's survey of 179½ acres at one thousand varas on same course, N. 45 E. to place of beginning.

Survey of 140½ *Acres for A. M. Gwatney, referred to.*

Begin at a post, the upper corner of D. N. White's survey of 320 acres, 72 varas from edge of bay a lignum vitæ six inches in diameter S. 45 W. 33 varas, marked +. A palmetto N. 76 west 22 varas, S. 45 W. 795 varas, a bayou 50 varas wide, 1325 varas same course with D. N. White's upper line. A post in prairie a corner of said White's survey, S. 45 E. with said White's southwest line 700 varas, a post in prairie a corner of said White's survey S. 85 E. 865 varas, a post on salt marsh of Powderhorn bay, a corner of said White's survey, S. 79 W. 650 varas, S 71½ W. 410½ varas; a stake on bank of Powderhorn bay for south corner of this survey; thence N. 45 W. 1131 varas, a stake on lower line of survey of 476 acres for I. T. Dillon, the west corner of this survey, N. 45 E. 832 varas, a bayou 40 varas wide, 1642 varas to bay of Matagorda, whence a stake, S. 44 west 65 varas, from said stake a lignum vitæ marked +, bears south 70 west 22 varas, thence south 56½ east 255 varas to beginning.

Survey of 960 *acres for J. Calligan, referred to.*

Began at south corner of 140½ acres, survey of A. M. Gwatney; thence along bank of Powderhorn bay 371½ W. 301$\frac{9}{10}$ varas, N. 76½ W. 774 varas, S. 41 W. 486 varas, S. 35½ E. 483 varas, S. 32½ W. 540 varas, S. 35½ W. 684 varas, S. 60½ W. 774 varas, S. 65 W. 140 varas, for south corner of this survey; thence N. 45 W. 270 varas. A stake in Prairie, for west corner of this survey; thence N. 45 E. 1267 varas to west corner of a survey of 640 acres for Thomas Wilson.

Thence S. 45 E. with line of said Wilson's survey 981 varas to said Wilson's south corner.

Thence with a line of said Wilson's survey N. 45 E. 390 varas to west corner of a survey of 476 acres, for J. T. Dillon.

Thence N. 45 E. with a line of Dillon's survey 1633$\frac{1}{10}$ varas, for north corner of this survey, and west corner of a survey of 140½ acres for A. M. Gwatney.

Thence S. 45° E. 1131 varas to place of beginning.

Survey of 476 *acres of J. T. Dillon, referred to.*

Begin at the north corner of a survey of 140½ acres for A. M. Gwatney. Thence S. 45 E. 770 varas a bayou, a bayou 40 varas

wide, 1642 varas, a corner of said Gwatney's survey 3275 1/10 varas to stake in Prairie, the south corner of this survey. Thence N. 45 W. 820 varas, a stake in Prairie on lower line of survey of 640 acres, for Thomas Wilson, the west corner of this survey. Thence N. 45 E. 3284 9/10 varas to bay shore of Matagorda bay, on this line at 2450 varas, crossing a marsh and small lake 500 varas wide. Thence down bay with its meanders to place of beginning, crossing a small bayou 20 varas wide at 280 varas from said beginning corner.

Survey of 640 *acres for Thomas Wilson, referred to.*

Beginning at upper corner of a survey of J. T. Dillon for 476 acres; thence S. 45 W. at 325 varas, a marsh and small lake 500 varas wide, 3654 9/10 varas; a stake in prairie for south corner of this survey. Thence N. 45 W. 981 varas for west corner of this survey; a stake in prairie. Thence N. 45 E. 3754 varas, for north corner of this survey on bank of Matagorda bay, which is east corner of a survey for Fielding Jones. Thence with the meanders of the bay to the place of beginning.

Survey of 640 *acres for Fielding Jones, referred to.*

Beginning at north corner of survey of 640 acres of Thomas Wilson; a stake on the bay. Thence with Wilson's N. W. boundary S. 45 W. 3571–5 varas, a stake in the prairie, at 1760 varas. On this line a marsh and small lake 500 varas wide. Thence N. 45 W. 950 varas to the S. E. boundary of a survey of one-third league for S. A. White, a stake in the prairie. Thence N. 45 E. with White's S. E. boundary 4031 le varas to the shore of Matagorda bay, and White's east corner, from which Henk's house bears N. 83° 30 W. 27 varas. Thence down the bay with its meanders to place of beginning.

Survey for one-third league for S. A. White, referred to.

Beginning at north corner of a survey of 640 acres for Fielding Jones; at 364 varas a high ridge 2624 varas, a bayou 10 varas wide 5444 varas, a stake in the prairie for south corner of this survey. Thence N. 45 W. to line of survey for Benito Morales 634 varas, 1444 varas, a stake in prairie for west corner of this survey. Thence N. 45 E. 4370 varas, a marsh 700 varas wide 5070, a high ridge 220 varas wide 5290 varas, a marsh 200 varas wide 6100 varas to shore of Matagorda bay. Thence southeastwardly to place of beginning, following meanders of bay.

The State of Texas, County of Calhoun.

District Court of the United States for the District of Texas, Galveston, January Term, 1856.

I, Henry Beaumont, county surveyor of the county of Calhoun,

State aforesaid, hereby certify under the oath of my office, that the foregoing field-notes, together with all the facts set forth in the same, having relation, grants of Juan Cano and Benito Morales, and of locations and surveys thereupon, are true and correct; and that the plats accompanying the same are drawn in accordance with the calls and landmarks therein described. And I further certify that in the course of the survey aforesaid, I was unable to identify any landmark or corner other than as described in the said field-notes, called for in the grants of said Cano and Morales, except the mot Artialga, to which reference is fully made in the above field-notes.

Given under my hand, at my office at Indianola, this 29th day of May, 1855.

HENRY BEAUMONT,
County Surveyor, Calhoun County.

[For map of H. Beaumont, see original, page 268.]

The State of Texas, County of Calhoun.

I certify this to be a correct plat of the grants of Juan Cano and Benito Morales, and of the locations and surveys made thereupon, with their connections with the bays of Matagorda and Powderhorn, and Powderhorn bayou.

INDIANOLA, May 29th, 1855.

HENRY BEAUMONT,
County Surveyor, Calhoun County.

Bill of Exceptions, continued.—Charles Hoffman's Testimony.

Defendant introduced Charles C. Hoffman, a competent witness, who being sworn, testified: Knows William M. Cook, the defendant. Has known him since 1847 or 1848. Knows Powderhorn bayou and bay, and the land in controversy claimed by said Cook. Went there, in 1847 or 1848, with Neill Carlin, on said land, as tenants of Cook. We were partners then. Put up a shanty, in which we lived. On the land, timber and lumber was very scarce there then. The house we built was from material obtained from an old wreck. We got permission from Cook to have a shipyard at Powderhorn, on the land in controversy. I am a ship-carpenter. And under this permission of Cook we established a shipyard there. I repaired several small craft there. I knew no other claimant to the land but Cook. I made inquiries for the owner, and was directed to Cook. Cook came riding along, and gave us possession of the land. We dug three or four weeks on the land. I was there living a part of the summer and winter next after settling there. I have left there, and went to Indianola, to work with Judge Palmer, but left my partner,

Neill Carlin, in possession of the place. There was no person living on the land claimed by Cook when Carlin and myself went to live there. In 1835 I was at Powderhorn bayou, in a Texas privateer. Am well acquainted with that bayou and the bays and lands about there.

The bayou is navigable for vessels drawing four and four and a half feet of water, and Powderhorn bay is about six or seven miles long, and almost four miles wide, and is in places five or six feet deep. Have waded all over the bay. It is full of oysters. There is a channel on each side, and oyster flats in the middle.

The bayou is an excellent harbor for small craft, and is so used. The land claimed by Cook, and on which myself and Carlin lived, is on an island completely surrounded by salt water, and is separated by bayous and lagoons from the main land, in which the tide ebbs and flows as regularly is it does in Matagorda Bay, with which they are connected.

Charles C. Hoffman cross-examined.

It was in the year 1847 or '8, or about that time, that Neal Carline and myself stopped at Powderhorn bayou, and lived there under authority from defendant Cook. Being asked if he was certain as to the year, said it was about 1847, or eight. Being asked by what means he fixed the year they went there, could not say, but knew it was in 1847 or eight.

Witness was at San Antonio. Had been there during the spring and part of the summer. Came down to Victoria; there met Neal Carline, who had started out to El Passo with a train, but got hurt by a mule, and had to stop. Witness was with Carline a week or ten days at Victoria. Then they came down to the coast together. Came to Powderhorn bayou. Stopped there on the logs, and fished and oystered for several days. Thought it would be a nice place for them to stay. Carline told him the land belonged to Col. Cook. Said McDonald had told him so, when he worked for him on the wharf. Col. Cook came riding along, and gave witness and Carline permission to remain there. Showed them where to dig a well. Said we might have boats there to work on them.

At that time there was no one living nearer the bayou than John Swartz. Swartz had a nice, comfortable place, about half way up to Indianola. (Points out on the map about where Swartz lived. See map.) There was no improvement of any kind nearer the bayou, on the north side, than Swartz; no traces of any wharf, no piles, nor anything on that side of the bayou. When they went there the wharf was over at Lasalle. Witness worked for Mason, over at Lasalle, on the wharf; remained at Powderhorn until cold weather; we had a little shanty made out of timber picked up, and a canvass to keep out the Northers; it was pretty comfortable; we lived in it; we fished and oystered, worked on boats, and did jobs about. (Points

out on the map where they lived, and where they hauled out boats.) It was three or four months after we first stopped at Powderhorn, when the steamship Mexico went ashore right against the mouth of Powderhorn; had partly built our house when the Mexico was blown ashore; had some canvass stretched; after that added to it from a wreck. Is certain witness was living at Powderhorn when the Mexico went ashore; had been there three or four months; recollects the men coming ashore every day. They had been living at Powderhorn five or six months when the cattle-pen was built there; Philip Howerton built the pen; he was not the man who shipped the cattle though; don't recollect who it was; recollects the Portland was sunk a little below Powderhorn; Deekrow employed witness and others to go out and try and raise her. Lived at Powderhorn with Carline part of a summer and winter; then went to Indianola and lived with Judge Palmer. Said again it was in 1847 or '48 he and Carline went to Powderhorn, or about that time. Witness said he was a soldier in Col. Johnston's Texas Regiment of foot volunteers during the war between Mexico and the United States; went with the regiment to Camargo; was there when it was discharged and paid off, just before the battle of Monterey; asked if it was not in August or September, 1846, the regiment disbanded; said he believed it was; witness remained at Camargo after the regiment was discharged a week or two; came down to Brazos Santiago, and stayed there about three months; went over to Padre Island, to Tellmys, and was there about three months; then shipped with Arch Moffatt, run into Saluria and repaired, and fitted out again; was there about a month; came up to Galveston; was here a month or so; shipped with Capt. Moore, went down to Vera Cruz, and was with Capt. Moore there about three months; left Capt. Moore; staid there cruising about six or eight weeks longer; shipped with Capt. Jackson in the schooner General Patterson; came to Brazos Santiago; went over to Bagdad (a little town a few miles above the mouth of the Rio Grande); was there a month or so; came down to the mouth of the river; stopped there at that time two or three months; Arch Moffatt came by; shipped with him again; ran with him some time; don't know how long; came back to Galveston; worked about Galveston a long time, caulking and fixing boats, doing all sorts of jobs, working at confectionery some, taking a cruise when I got tired; built a house upon Dickinson for Benson. The witness was not able to give a connected account of his movements, or the time occupied by his stay or occupation at different places; went from Galveston down to Indianola on a steamer with Capt. Place; enlisted to go in Coon's train out to Eagle Pass; went with it up above San Antonio and stopped; came back to San Antonio; it was in the spring of the year; remained in San Antonio part of the spring and summer; came from there down to Victoria, and met Carline and stopped there. And that's the time they then came to Powderhorn and

stopped there; no improvement of any kind there then; witness and Carline made the first improvement; there was no agreement in writing between Col. Cook and witness; all that passed between them about their staying there was what has been stated, viz., the permission he gave them to live there and have a shipyard; nothing else passed between Col. Cook and Carline that witness ever heard of. Being asked if they had possession and were to take charge of the land about the bayou, replied, Oh, no, except where we lived. Did Col. Cook put you or Carline in possession of the tract of land claimed by him, or did you have charge of the whole tract, or any other land about there, than just where they stayed?

Replied, Oh no. Witness resides over at Campbell's, a little above Virginia Point, about five or six miles from Galveston; has lived there several years; makes that his home, but knocks about when I can get a job of work; now over at Bolivar Point, six or seven miles from Galveston, repairing a boat. Col. Cook came over and said he wanted me to go to Hempstead, and he would give me a good job of work to build a mill; went with Col. Cook; went on the steamboat together to Houston, then took the railroad car to Hempstead; got to Hempstead about eleven o'clock. In about an hour, Col. Cook told me he could not find the man he expected to see about the mill, and must give up the job. Col. Cook said we had better attend to that other matter. Counsel asked what other matter? Said, giving the deposition. Witness went over to the notary's, another Mr. Cook. Gave him the paper. Counsel asked what paper? Replied, the paper Col. Cook gave witness on the car going up. The notary copied it off; it read about right, and witness signed and swore to it. Next day, witness and Col. Cook came back to Houston, and then down to Galveston together. Question. Who paid the expenses of your trip? Answer. Col. Cook. Question. Did he pay you anything else? Answer. He allowed me two dollars a day. Question. Did you swear in that deposition that you lived at Hempstead? Answer. Oh no; could not have done that. Question. Did you swear that you settled at Powderhorn as Cook's tenant, in February, 1847? Answer. Well it was along about there, some time; don't recollect exactly what year. A paper was produced to witness, and he identified it as the paper handed to him by Col. Cook on the cars, and from which the notary copied his deposition. Counsel of Cook admitted the paper was in Cook's handwriting.

Re-examined.

Says again the Mexico went ashore whilst witness lived at Powderhorn, a few months after he went there, and before he went up to Indianola, to live with Judge Palmer. It was right at the mouth of the bayou. Don't remember anything about the steamship Palmetto. Says Col. Cook did not tamper with witness to get him to

swear in this case. Identified his signature to the deposition; says he swore to it before Cook, the notary. Thinks it contains about the truth about what he has sworn here. Since this court commenced, Dr. Levi Jones came to see witness. Asked about the deposition he gave at Hempstead. Witness showed him the paper Col. Cook gave him. Dr. Jones told him he would be summoned as a witness. They had very little conversation. Afterwards, the deputy marshal came and summoned him as a witness. Dr. Jones was along. Asked witness for the paper; witness gave it to him, and Dr. Jones handed it to the deputy marshal, Mr. Cady. Judge William J. Jones summoned witness again to attend court, and handed him five dollars to bear his expenses. Said he must come.

Bill of Exceptions, continued.—John F. Segui's Testimony.

John F. Segui, a competent witness, was introduced by defendant, was sworn and testified. Knows Col. Cook, the defendant, and knows Powderhorn bayou, and the land claimed by Col. Cook. It is the site of the present city of Indianola, the county seat of Calhoun county. There is a population living there of 800 or 1000 persons. There are very valuable improvements in the place, consisting of dwellings, stores, wharves, a court-house, churches, &c. It is the most important shipping point on or about Matagorda bay. The improvements are at least worth $150,000. In March, 1849, Neill Carlin was living in a little house at Powderhorn bayou. There was no other person there then; knows Charles C. Hoffman; does not recollect to have seen him living with Carlin at Powderhorn in 1849. At that time it was the general report and understanding, that Cook was the owner of that land; knew nor heard of no other, though I lived at Indianola, about three miles distant from it. Small sloops and schooners and river steamboats can navigate Powderhorn bayou. It affords a better harbor than Matagorda bay. The house that Neal Carlin was living in in 1849, Daniel Elam in 1850 put up an addition to, and lived in it until he died, in 1850 or 1851. It is still standing, and occupied by Cook, the defendant. Witness first arrived in Matagorda bay in January, 1849, settled at Lavacca, moved down to Indianola in March, 1849. Witness went riding down to Powderhorn from Indianola frequently, and knows that in March, 1849, Carline was then living there. In the latter part of 1849, witness engaged with John Henry Brown, Macon McDonald, and others, to build a wharf at Powderhorn. An injunction was served on them from the Federal court, and they quit the work, compromised with Dr. Jones, and built the wharf over at La Salle. This was in the latter part of 1849. The Mexico went ashore at Powderhorn in 1852. The Telegraph got aground at Gallinipper bar, between Indianola and Lavacca, in 1849. Judge Palmer had moved away from Indianola when the Mexico went ashore. Knows nothing of

where Charles Hoffman then was; only recollect seeing him making candy at Judge Palmer's. Never saw him at Powderhorn with Carlin.

Cross-examined, John F. Segui, by Plaintiff's Attorney.

Went to Indianola in March, 1849. It was about four months before he commenced arrangements for building the wharf at Powderhorn. In the latter part of 1849, or early part of 1850, they moved the wharf over to La Salle. When first went to Indianola rode down to the bayou very often; found Carlin there, living in a little house built out of odds and ends and part of the cabin of a steamer. Carlin remained in that house until Elam took possession, which was in 1849. Elam was living there when they commenced the wharf at Powderhorn, in 1849, or certainly before they quit work on the wharf there that year. Elam remained there until his death, in 1850 or 1851. Witness has not a good memory for dates. Being shown the record of the injunction suit, commenced in the Federal court April 8th, 1850, said it was after that they compromised with Dr. Jones and built the wharf at La Salle, though he had thought it was in 1849.

Witness was a defendant in the injunction suit; was shown the jurat to defendant's answer in that suit as follows:

Jurat of John F. Segui, &c.

United States of America, District of Texas.

Before the undersigned, a commissioner of the United States District Court for the District of Texas, duly commissioned and sworn, personally appeared John H. Brown, John F. Segui, Charles Mason, Donald H. McDonald, and Chambers Etter, who being duly sworn on oath says, that the matters and things set forth in the foregoing answers, so far as come within their own knowledge, information, or belief, are true; and so far as they come within the knowledge, information, or belief of any other person, they believe to be true.

JOHN HENRY BROWN,
JOHN F. SEGUI,
D. H. McDONALD,
CHAMBERS ETTER.

Sworn to and subscribed this 12th day of July, A. D. 1850, before me,

J. HAWERTON,
U. S. Commissioner.

Said the signature purporting to be that of witness is his. The wharf company first made arrangements with Mr. S. A. White to build

the wharf at Powderhorn under White's title. They found he had no title. Then they made arrangements with Col. Cook, and defended the suit under Cook's title. Was asked if the title which they set up and relied on in their defence was not the location by William M. Cook, on the 12th September, 1849, of a certificate issued to James A. Wells, and conveyance by Cook of the undivided one-half thereof to John Henry Brown, March 1st, 1850. Examined the answer, and said they did. Witness pointed out on the map the place where they built the wharf at La Salle, north of the Artialga mot, and on the Juan Cano grant (see place). Sam. Harding was then living farther back from the bay, and north of the wharf, or near Powderhorn bayou; lived there with his family, and continued to live there until his death. The wharf at La Salle did not stand long; part of it was blown down; and in 1854 all of it was washed ashore. They built the wharf at La Salle by arrangement with D. Jones, under the Burnley title. Made this arrangement after the Federal court refused to dissolve the injunction granted against building the wharf at Powderhorn.

Re-examined.

"Baranca" is not a pure Spanish word—is Mexican. Does not know its signification.

Bill of Exceptions, continued.—Charles C. Hoffman, recalled.

On the morning following the day of the preceding examination of Charles C. Hoffman, the said Hoffman was again introduced as a witness, and certified: I have seen Mr. Sylvester down where I board, and found out that I made a mistake, in saying that the Mexico went ashore whilst I lived at Powderhorn. It was the steamer Telegraph.

Cross-examined.

The Telegraph went ashore between Powderhorn and Indianola, about two miles from Powderhorn. Being asked if the Telegraph did not go ashore at Gallinipper bar, said it might have been at Gallinipper. That's up above Indianola, seven or eight miles above Powderhorn. Has had no talk at all with Colonel Cook about his evidence since yesterday. They took a drink together. It was Mr. Sylvester told him he had made a mistake.

Being asked if Mr. Sylvester was down there about Powderhorn in those times, said "No." Being asked what Sylvester told him, that satisfied him he had made a mistake, said he told him about the date he shipped with Arch. Moffitt. When witness came with Carline from Victoria down to Powderhorn, there was no improvement of any

kind there; is certain of that. Carline told him, when they stopped at Powderhorn, the land belonged to Cook, and that McDonald told him (Carline) so, when he worked for him on the wharf. When they first got to Powderhorn, the wharf was standing over at Lasalle. Hasn't made any mistake about that.

Bill of Exceptions, continued.—George T. Theelpappa—Evidence.

George T. Theelpapa, a witness sworn on behalf of defendant Cook, testified.

Witness resides at the present town of Indianola. Is a civil engineer by profession; is now deputy surveyor of Calhoun county. Came to Matagorda bay in the spring of 1845, with Prince Solmes. About 3000 immigrants were landed at the old town of Indianola, then Indian Point, which was about three miles above the mouth of Powderhorn bayou. The town now extends from Powderhorn bayou up the bay, and is called Indianola. I was directed by Prince Solmes, in 1845, to examine the country in that vicinity, to ascertain the best site for a town, and became acquainted with the bayous and lakes adjacent, and have been ever since.

The map presented to the jury, marked G. F. T., was made by witness. The bayou, which runs up parallel with the bay as it appears on the map, continues to White's bayou, and connects with it. About four miles above Powderhorn bayou, White's bayou runs into the bay. The map does not extend up to White's bayou. The tide ebbs and flows through these bayous and the lagoons which they connect, as regularly as in the bay. The water is three or four feet deep, and at the bottom is a deposit of soft mud, which could easily be dredged out. The land on which the defendant Cook's survey is situated is separated by these bayous from the main land.

Being asked if the land claimed by the defendant Cook was not an island, witness answered, that according to the definition of an island, which was land surrounded by water, it was, and was surrounded by tide-water.

There was also a small bayou above Swartz, which runs from Moore's lake into the bay, called Wind bayou, which was sometimes stopped up, and no water in it, but was often open, and the tide-water run regularly through it.

The map made by witness is correct from the field-notes, from which he made it. Witness thinks the correct mode of closing the survey, from the end of the third line, is to run the lines as they appear on the said map. From the termination of the third line, the survey may also be closed by following the meanders of the bayous and lagoons to the beginning, as shown in the map. This would leave in the lines of the survey more than a league of land.

Cross-examined.

The map made by witness was platted from the field-notes of the survey of the Juan Cano league given witness by Mr. Beaumont. Being shown the field-notes agreed on by counsel, accompanying the order of survey, said they were not the field-notes from which he made the map. Being shown the field-notes of Beaumont in his return of survey of Juan Cano league, he identified them as the same which had been copied, down to and including the words, 1400 vs. in length, where witnessed placed a †, in order to identify them, and given to him to draft said map.

In drawing said map, he had had reference alone to the calls of distance, without knowing the call for the corner. As a surveyor, if the third line had purported to run to Matagorda bay, he should not have stopped it where it was, but would have extended it to the bay, but where a specific distance is given, would run the distance, and designate it. Said map is as follows:

[For map of Theilepape, see original, page 288.]

Bill of Exceptions, continued.—James Meyers' Evidence.

Defendant also introduced James Meyers, who was sworn, and testified as follows: I have resided in Galveston about twelve years; in the fall of 1846, the defendant, Col. Cook, bought a steamboat in Galveston, called the "Little Sally," on which witness was then engineer. Cook took her to Matagorda bay, and commanded her himself, and witness continued engineer of her for about six months. Some time early in 1847, witness remembers, that they run with her into Powderhorn bayou; had no difficulty in getting in; lay there about three weeks, repairing; recollects a family named Swartz lived in a house a mile or so up the beach, towards Indianola; recollects that Charley Hoffman came aboard the boat several times whilst they lay in Powder bayou; witness had known him twelve years; he seemed to be living about there, but witness doesn't know where; witness supposed he wanted a job of work; witness points out on the map the bend in the bayou where the boat lay (see map); about half a mile off there was a little house; points out the spot on the map (see map); was not at the house; was not nearer to it than the boat; don't know who lived there; appeared to be built out of an old wreck; in pointing out on the map the spot of the house, means only to show the direction; the distance was about a half a mile off; doesn't know what the distance would be on the map; knows nothing of maps; is a steamboat engineer.

The defendants closed their testimony.

Bill of Exceptions, continued.—Edward Linn's Deposition, taken Jan. 31st, 1854.

Plaintiffs then read the deposition of Edward Linn, taken January 31st, 1854, with notice to defendants, and also Exhibits A, B, C, and D, therewith, as follows:

I am the district surveyor of Victoria land district, and the county of Calhoun was part of that district until the month of November, 1852, and have been such surveyor since the fall of 1847, and I recognize the papers marked A, B, C, and D; they are correct copies from the records of my office, as certified upon the face of them; the location as described in paper marked A, was entered on the record by me, after I had taken possession as deputy surveyor. The only survey made by me of the land described in those papers, was under location No. 429, as described in paper C, which survey was made the 15th May, 1850, and the field-notes recorded on the 29th of same month; and the survey was made at the request of William M. Cook, who paid the fees on the same. And the said field-notes was altered to land warrant No. 990, by the direction and request of said Cook, on the 13th of January, 1851; and on that day were recorded as a survey, made by virtue of a land warrant, No. 990, as described in paper D.

My brother kept store in the town of Victoria, in De Leon's colony, from the month of May, 1830, until March, 1836, and I lived with him the greater part of that time to the month of July, 1835, and I knew a person of the name of Juan Cano, and a citizen of De Leon's colony, and a native Mexican; and I have written my name on the papers marked A, B, C, and D, and place them with this deposition, and further I say not.

EDWARD LINN.

Exhibit A., referred to in Edward Linn's Deposition.

Location No. 339. Indian Point, January 5th, 1847.

To the County Surveyor of Victoria County.

Will please survey 320 acres of land on bounty warrant No. 990, on Matagorda bay, at the mouth of Powderhorn bayou, commencing at the on the N. W. side, thence up the bay and back for quantity.

WM. M. COOK.

I hereby certify that the aforesaid entry, No. 339, to be a true copy, taken from the Book of Entries for locations, at my office.

Given under my hand and seal, having no seal of office, this 13th day of March, 1852.

EDWARD LINN, [L. S.]
District Surveyor, Victoria District.

Indorsed on the back, "Edward Linn."

Exhibit B., referred to in Edward Linn's Deposition.

Location No. 429. Sept. 12th, 1849.

William M. Cook locates land warrant No. 5072, issued to James A. Wells, for 320 acres of land, commencing at the east corner of a survey made for D. N. White, on the southwest side of Matagorda bay; thence down the bay to Powderhorn bayou; thence up the bayou and back, for quantity.

I hereby certify that the foregoing entry, No. 429, to be a true copy, taken from the Entry Book at this office.

Given under my hand and seal, having no seal of office, this the 13th day of March, 1852.

EDWARD LINN, [L. S.]
District Surveyor, Victoria District.

Indorsed on the back, "Edward Linn."

Exhibit C., referred to in Edward Linn's Deposition.

Survey of James A. Wells, of 179⅕ acres of situated on the west side of Matagorda bay, and on the north margin of Powderhorn bayou, about three miles southeast from the town of Indianola, county of Calhoun, district of Victoria, it being part of the quantity to which he is entitled, by virtue of land warrant No. 5072, dated at Houston, December 13th, 1838, and issued to James A. Wells.

Beginning at a stake 1100 varas from the mouth of Powderhorn bayou, from which a double palmetto, which stands in the south end of the "mot;" one of three mots bears S. 32° 45° W., and the north end of north mot bears S. 47° west; thence down the bay with its meanders, S. 52° east, 953 varas; thence S. 35° E. 157 varas to the mouth of Powderhorn bayou, a post, from which the north point of Powderhorn bayou bears N. 36° 15′ east, about 630 varas, and the N. W. end of Brown's wharf bears N. 36° 15′ E. about 630 varas; thence up the bayou with its meanders, S. 45° W. 114 varas; thence S. 83° 30′ W. 141 varas; S. 74° 15′ W. 410 varas; S. 37°, 15° W. 295 varas, to Powderhorn or Fish lake, a post. Thence, following the lake, N. 45° W. 80 varas; S. 62° W. 205 varas; N. 83° W. through salt marsh, 605 varas; N. 24° E. 485 varas, to the mouth of a bayou, and runs northwest; thence with the bayou N. 17° E. 325 varas, to bank of bayou, a post, from which the south end of north mot bears S. 35° W. 300 varas. Thence N. 45° E. 600 varas, to the place of beginning. Surveyed, May 15th, 1850.

PHILIP ECHELBACK,
MARTIN SIGMUND,
Chainmen.

EDWARD LINN,
District Surveyor, Victoria County.

Recorded, May 29th, 1850, the above field-notes, altered to land warrant No. 990, transferred to William M. Cook.

I do hereby certify that the foregoing field-notes to be a true copy, taken from the records of my office.

Given at Victoria, May 15th, 1852.

EDWARD LINN,
District Surveyor, Victoria County.

Indorsed, Edward Linn.

Bill of Exceptions, continued.—Exhibit D., referred to in Edward Linn's Deposition.

Survey of 179$\frac{5}{10}$ acres of land, for William M. Cook, situated on the southwest side of Matagorda bay, and on the north margin of Powderhorn bayou, about three miles southeast from the town of Indianola, county of Calhoun, district of Victoria, it being part of the quantity of land to which he is entitled by virtue of land warrant No. 990, dated at Houston, December 13th, 1837, issued to Abraham M. Gwatney, and by him transferred to said Cook.

Beginning at a stake one thousand one hundred varas from the mouth of Powderhorn bayou, from which stands in the south end of the south "mot" (one of three mots), bears S. 32° 45° west, and the north end of the north mot bears S. 45° W.

Thence down the bay with its meanders, S. 52° 953 varas, thence S. 35° E. 157 varas, to the mouth of Powderhorn bayou, a post, from which the north point of the mouth of Powderhorn bayou bears N. 23 E. 63 varas.

Thence up the bayou with its meanders S. 45° W. 114 varas, thence S. 80° 30° W. 141 varas, S. 74° 15° W. 410 varas, S. 37° 15° W. 295 varas, to Powderhorn or Fish lake, a post; thence following the lake N. 45° W. 80 varas, S. 62° W. 205 varas, N. 82° 15° W., through salt marsh, 605 varas. Thence N. 24° E. 485 varas, to the mouth of a bayou. Thence with bayou N. 170 E. 325 varas, to a post, on the bank of bayou, from which the south end of north mot bears S. 45 W. 300 varas. Thence N. 45 E. 600 varas, to the place of beginning.

Surveyed May 15th, 1850.

PHILIP ECHELBACH,
MARTIN SEGMUND,
Chainmen.

Recorded January 13th, 1851.

EDWARD LINN,
District Surveyor, Victoria District.

I do hereby certify that the within is a true copy of the field-notes

of the survey made for William M. Cook, assignee of Abraham M. Gwatney.

Given at Victoria, May 11th, 1852.

EDWARD LINN,
District Surveyor, Victoria County.

Indorsed, Edward Linn.

Bill of Exceptions, continued.—Deposition of Edward Linn, taken 6th February, 1856.

Plaintiffs then read the deposition of Edward Linn, taken on the 6th day of February, 1856, by the defendants in this cause, with the exhibits therewith relating to this case, as follows:

I am acquainted with the parties plaintiffs and defendants. I am the legal surveyor of the Victoria land district, since 1838 to 1840, and from the year 1847 till the present time. My first commission was April, 1838 to 1840; my second from 1847 until this date. I know of no record of entry of A. M. Gwatney, certificate No. 990, earlier than January 5th, 1847. I do not know of any understanding about the location and survey of said land certificate, at least with myself. There was always an entry-book kept in the surveyor's office, from the opening of the general land office, in which all applications for entry were recorded. It was customary for persons to give verbal instructions, so that the surveyor could make the entry; the applicant would make his application in writing, so that the surveyor could file the application and record it. I have held the office for eleven years, and have not received an entry that I have not placed on the record-book, with the exception of such as I have received in the woods, and surveyed forthwith. The parties making such locations ran no risk of losing their location. During my term in office there was no papers lost, rendering relocations and surveys necessary.

EDWARD LINN.

Cross-interrogatories.

The location of the land warrant No. 990 was dated January 5th, 1847, a full copy of which is appended to these depositions, being A. M. Gwatney's certificate. There was no survey made under the Gwatney certificate, but a survey was made under a location No. 439, of land warrant No. 5073, issued to James A. Wells, for 179½ acres, on the 15th day of May, 1850, and afterwards transferred or altered to the Gwatney certificate, January 13th, 1851. There are no other location of the Gwatney certificates but the one above stated, but there appears to be a survey transferred to said certificate, 1846, and made on the flats in Matagorda Bay, between the shore and the channel, and in front of the surveys of F. De Leon, B. Morales, and

Juan Cano, the location of which was made under a different certificate, No. 936, issued by the Board of Land Commissioners of Harris County, to Thos. C. Delano. The entries made by S. A. White and Wm. M. Cook, were placed on my entry-books, but I find three surveys, conflicting with the lands of F. De Leon, B. Morales, and others, for which I find no entries; there has been no entries lost since I have had charge of the office. The certificate of D. N. White was located on 17th September, 1841, on the south side of Powderhorn bayou and lake, on the land, in the name of Juan Cano. The certificate of D. N. White was not surveyed upon the land expressed in the location, but in two different parcels. Surveys made February, 1842.

The first connected map of the survey made in Victoria district, was made by me, and deposited in the general land office in 1838. The headright leagues of Leonardo Mauro, Juan Cano, and B. Morales, with all the lands titled by De Leon, as commissioner, was laid down on said map, and designated by the owners' names. I knew Juan Cano and L. Mauro very well; Morales do not recollect so well. Mauro was a prominent person. I knew them in Victoria. Cano and Mauro lived first in Victoria, afterwards on the west side of the Lavaca river. They were all, viz., Mauro, Cano, and Morales, colonists in the colony of Martin De Leon. They came to the colony in the year 1831 or 1832. When Mauro and Cano settled on the Lavaca, in the latter part of 1833, or the spring of the year 1834, S. A. White and William M. Cook both made locations of certificates on the headright leagues of Juan Cano and B. Morales, as shown by the map hereto appended. When White and Cook made their locations on said headrights, they both knew of the colonial titles to said lands, and S. A. White particularly, and also knew that then there were other claimants to said headright lands. I knew S. A. White living at Indian Point in the year 1842, and on the land of F. De Leon, as will be seen in the map appended hereto. To the best of my knowledge White never lived on the Cano or Morales league, or had he any person under him, any improvement to my knowledge; but I knew that J. H. Beck, in 1842, was cultivating a tract of some ten acres or more, partially cleared in chapparal, which was used for fencing against stock. S. A. White had no connected or continuous location from his residence to the improvement cultivated by J. H. Beck. S. A. White and William M. Cook claimed adversely to each other the right to the locations at Powderhorn. They continued adversely upon the D. N. White and Gwatney certificates, subsequently to the survey made for Cook at Powderhorn in 1850. I append hereto, also, copies of all the locations and surveys made for either of the defendants, on the colonist headrights, of both Juan Cano and Benito Morales, so far as I find them on record in my office, and numbered from 1 to 14 by the commissioners.

EDWARD LINN.

Bill of Exceptions, continued.—Exhibit referred to D. N. White's survey of 320 *acres.*

State of Texas, District of Victoria.

Survey of 320 acres of land for David N. White, situated on the west side of Matagorda bay, in the county of Victoria, it being the quantity of land to which he is entitled by virtue of land warrant No. 3543, issued to the said D. N. White by the secretary of the war, and dated at Houston the 24th day of May, 1838.

Beginning at the margin of the bay, 1100 varas from the mouth of Powderhorn bayou, thence N. 54° W. with the meanders of the bay. At 1350 varas, a post, from which a lignum vitæ, six metres in diameter, marked +, bears S. 41 W. 105 varas.

Thence S. 45 W. at 795 varas, a bayou 50 varas wide; at 1325 varas, a post in the prairie.

Thence S. 45 E. at 700 varas, a post on the salt marsh of Powderhorn lake.

Thence N. 45° E. at 130 varas, a bayou 100 varas wide, at 100 varas, the place of beginning.

CHARLES M. CREEMER,
County Surveyor, Victoria County.

D. N. WHITE,
W. F. WHITE, } Chain carriers.

February, 1842.

I, Charles M. Creemer, declare, under the oath of my office, that the foregoing survey was made according to law, and that the limits, boundaries, and corners, with the marks, natural and artificial, are truly described in the above plat and field-notes.

CHARLES M. CREEMER,
County Surveyor, Victoria County.

Recorded May 1st, 1849.

I hereby certify that the within field-notes of the survey made for David N. White, to be a true copy of the same, taken from Book B, No. 1, of the records of my office.

Given under my hand at Victoria, this 6th day of February, 1856.

EDWARD LINN,
District Surveyor, Victoria District.

Exhibit referred, viz., Survey of 179½ *Acres for W. M. Cook.*

State of Texas, District of Victoria.

Survey for William M. Cook of 179½ acres of land, situated on the S. W. side of Matagorda bay, and on the north margin of Powderhorn bayou, about three miles southeast from the town of Indianola, county of Calhoun, district of Victoria,—it being part of the quantity

of land to which he is entitled, by virtue of land-warrant No. 990. Dated at Houston, December 13th, 1837, issued to Abraham M. Gwatney, and by him transferred to said Cook.

Beginning at a stake 1100 varas from the mouth of Powderhorn bayou, from which a double palmetto, which stands in the south end of the south mot (one of three mots), bears S. 32° 45° W., and the north end of the north mot bears S. 47 W.; thence down the bay, with its meanders, S. 52° E. 952 varas, S. 35° E. 157 varas, to the mouth of Powderhorn bayou, a post, from which the north point of the mouth of Powderhorn bayou bears N. 23 E. 63 varas, and the northwest end of Brown's wharf bears N. 36 15° E. about 630 varas; thence up the bayou, with its meanders, S. 45 W. 114 varas, S. 83° 30 W. 141 varas, S. 76° 15 W. 410 varas, S. 37° 15 W. 295 varas, to Powderhorn or Fish lake, a post; thence following the lake N. 48 W. 80 varas, S. 62° W. 205 varas, N. 83 15 W., through salt marsh, 605 varas, N. 24 E. 485 varas, to the mouth of bayou—runs N. west; thence with the bayou, N. 17 east 325 varas, to bank of bayou, a post, from which the south end of north mot bears S. 45 W. 300 varas; thence N. 45 E. 600 varas, to the place of beginning.

Surveyed May 15th, 1850.

EDWARD LINN,
District Surveyor, Victoria District.

PHILIP ECHELBACH,
MARTIN SIGMUND,
Chainmen.

Recorded January 13th, 1851.

I hereby certify that the foregoing field-notes of the survey made for William M. Cook to be a true copy of the same, taken from the Book B, No. 1, of the records of my office.

Given under my hand, at Victoria, this 6th day of February, 1856.

EDWARD LINN,
District Surveyor, Victoria County.

Bill of Exceptions, continued.—Exhibit referred to. Survey for James A. Wells, 640 Acres.

Survey for James A. Wells of 179½ acres of land, situated on the southwest side of Matagorda bay, and on the north margin of Powderhorn bayou, about three miles S. E. from the town of Indianola, county of Calhoun, and district of Victoria, it being part of the quantity to which he is entitled by virtue of land-warrant No. 5072. Dated at Houston, December 13th, 1838, and issued to James A. Wells.

Beginning at a stake 1100 varas from the mouth of Powderhorn bayou, from which a double palmetto, which stands in the south end of the south mot (one of three mots), bears S. 32° 45 W., and the

north end of the north mot bears S. 47 W.; thence down the bay, with its meanders, S. 52 E. 953 varas, S. 35 E. 157 varas, to the mouth of Powderhorn bayou, a post, from which the north point of Powderhorn bayou bears N. 23 east 63 varas, and the northwest end of Brown's wharf bears N. 36 15 E. about 630 varas; thence up the bayou, with its meanders, S. 45° W. 114 varas, S. 83 30 W. 141 varas, S. 74 15 W. 410 varas, S. 37 15 W. 295 varas, to Powderhorn or Fish lake, a post; thence following the lake N. 48 W. 80 varas, S. 62 W. 205 varas, N. 83 15° W., through salt marsh, 605 varas, N. 24° E. 485 varas, to mouth of bayou—runs N. W.; thence with the bayou N. of 170 E. 325 varas, to bank of bayou, a post, from which the south end of north mot bears S. 45 W. 300 varas; thence north 45° east 600 varas, to the place of beginning.

Surveyed May 15th, 1850.

EDWARD LINN,
District Surveyor, Victoria District.

PHILIP ECHELBACH,
MARTIN SIGMUND,
Chainmen.

Recorded May 29th, 1850.

The foregoing field-notes altered to L. W. No. 990, transferred to William M. Cook.

I hereby certify that the foregoing field-notes of the survey made for James A. Wells to be a true copy of the same, taken from Book B, No. 1, of the records of my office, and given under my hand, at Victoria, this 6th day of February, 1856.

EDWARD LINN,
District Surveyor, Victoria County.

Exhibit, referred to, and attached to Linn's Deposition.

State of Texas, District of Victoria.

Survey for Abraham M. Gwatney, of 640 acres of land, situated on the southwest side of Matagorda bay, in the county of Victoria, it being a part of the land to which he is entitled by virtue of land-warrant No. 990, dated at Houston, 16th December, 1847.

Beginning at a post on the edge of the first bayou, above Indian Point, thence N. 45 E. at 500 varas, a post, in the water, thence S. 63° E. at 1700 varas, a post near the ship-channel, thence S. 25 E. 3000 varas, to a post, in the water, thence S. 47 E. 2525 varas, to a post, in the water, thence S 45° W. 510 varas to the N. E. boundary of a survey made for S. A. White, thence N. 45 W. with said White's survey, at 530 varas to the east corner of a survey made for John T. Dillon, thence N. 60 west with said Dillon's survey, 600 varas, N. 48° W. 420 varas, his north corner and east corner of a survey

made for Thomas Wilson, thence N. 43 W. with Wilson's survey, 700 varas, N. 22 W. at 306 varas, Wilson's north corner, and the east corner of a survey made for Fielding Jones, thence N. 25 W. with Jones's survey, at 1048 varas, his north corner and the east corner of a survey made for S. A. White, thence N. 35 W. with said White's survey 600 varas, N. 23 W. 300 varas, N. 7° W. 700 varas, N. 26 W. at 600 varas, his north corner and east corner of a survey made for D. N. White, thence N. 26 W. with said D. N. White's survey 210 varas, N. 47 W. 120 varas, N. 66 W. 300 varas, N. 67 W. 900 varas, N. 64 W. at 520 varas, to the place of beginning.

CHARLES FRAZER,
DEAGO INCARNATION,
Chainmen.

I certify under the oath of my office, that the foregoing survey was made according to law, and that the limits, boundaries, and corners, with the marks, natural and artificial, are truly described in the above plat and field-notes.

I hereby certify that the foregoing to be a true copy of the foregoing field-notes, taken from the record book B. No. 1 of my office.
Given at Victoria, this 16th February, 1856.

EDWARD LINN,
District Surveyor of Victoria County.

Exhibit attached to Edward Linn's Deposition.

State of Texas, District of Victoria.

Location No. 308.

August 13th, 1845.

William M. Cook locates 836 acres of land by virtue of certificate No. 936, issued to Thomas C. Delano, by the board of land commissioners of Harrisburgh county, to begin at the northeast or upper corner of a survey made for S. A. White, on the bay shore of Lavaca bay, thence in a northeasterly direction to channel in said bay, thence with said channel, and said White's N. E. boundary line, so as to include all the flat of land lying in front and between said White's survey and said channel, thence with said White's survey down to the lower or S. W. corner of said survey, thence with the meanders of said bay shore and back to said channel, so as to include the flats to the channel in front of Fielding Jones's survey of 640 acres survey, thence with said bay shore, so as to include the beach, and to the channel, down with the meanders of said bay shore to Powderhorn bayou, being the flats from the bay shore N. E. to the channel, so as to include all the flats in front of the several surveys

from the said upper N. E. corner of said White's survey down to Powderhorn bayou.

I hereby certify that the foregoing to be a true copy of the aforesaid location, taken from the entry book of my office, and given at Victoria, this 6th day of February, 1856.

EDWARD LINN,
District Surveyor of Victoria District.

Exhibit attached to Edward Linn's Deposition.

State of Texas, District of Victoria.

Location No. 339.

INDIAN POINT, January 5th, 1847.

To the surveyor of Victoria county. Will please survey 320 acres of land on bounty warrant No. 990 on Matagorda bay, at the mouth of Powderhorn bayou, commencing at the mouth of Powderhorn bayou, on the N. W. side, thence up the bay and back for quantity.

WM. M. COOK.

I hereby certify that the above entry to be a true copy, taken from the entry book of my office, and do further certify, that there is an error in the date of the year, which should be 1848, in lieu of 1847.

Given under my hand, at Victoria, this 6th day of February, 1856.

EDWARD LINN,
District Surveyor of Victoria District.

Exhibit referred to in Edward Linn's Deposition.

State of Texas, District of Victoria.

Location No. 429. September 12th, 1849.

William M. Cook locates land warrant No. 5072, issued to James A. Wells, for 320 acres of land, commencing at the east corner of a survey made for D. A. White, on the S. W. side of Matagorda bay, thence down the bay to Powderhorn bayou, thence up the bayou and back for quantity.

I hereby certify that the foregoing to be a true copy of location No. 429, and taken from the entry book of my office, and given at Victoria this 6th day of February, 1856.

EDWARD LINN,
District Surveyor, Victoria District.

[For Edward Linn's map, see original, page 312.]

I hereby certify that the above plat to be a true copy of a map, made by the undersigned for the General Land Office, in the early

part of the year 1838, so far as it relates to the Colonial Surveys, which are marked with blue. Also showing a conflict of the subsequent locations and surveys, with the same marked with red.

Given at Victoria, this 6th day of February, 1856.

EDWARD LINN,
District Surveyor, Victoria District.

No. 1.

Signed and acknowledged before me by Edward Linn, District Surveyor, Victoria District.

JAMES INGRAM,
Commissioner.

Bill of Exceptions, continued.—Deposition of John Henry Brown.

Plaintiffs then read the deposition of John Henry Brown, taken on notice to defendants, January 27th, 1854, as follows:

I know the survey made for William M. Cook; I do not know that the survey was made on the Gwatney certificate of my own knowledge, but from general reputation have understood that it was. As well as I recollect, the said survey was made in the year 1850, I think in the month of May or June. The said survey lies on and above Powderhorn bayou, fronting Matagorda bay, and back to Powderhorn bay or lake, and adjoins the D. A. White survey above. There was no actual occupation of any portion of said survey up to the year 1850, to my knowledge.

The first occupation of that survey was by myself and others, in the month of March, 1850, by the commencement of a wharf.

The above occupancy continued until the first half of June, in the same year.

There was no connection or privity between myself and those connected with me, in the occupation of said land, with Neal Carlin. I only knew of the connection or tenancy, with or between the said Cook and Carline, by general reputation, and having heard the said Carline say he was Cook's tenant at the time he gave up the key of the house. I think he delivered the key about the month of September, 1851; that after the delivery of the key, Cook did not occupy the house in person. I recollect of no permanent occupancy of the said house until Elam took possession of it.

The house above mentioned as having been built in the year 1851, was built of timber obtained from the wreck of a steamer named Perry Smith, and around the house was a small inclosure of rather a temporary structure. I have seen a small class of open sailboats in Powderhorn bay or lake, a mile or two up. I have seen a lighter, flat bottom, which drew two or two and a half feet of water, pass through said bay or lake into Bullock's bayou and load with shells. In a direct line from place of loading with shells, to the mouth of Powderhorn bayou, is about three-quarters of a mile, and by water I should think it was about two miles. From the place of loading

with the said shells, to Matagorda bay, the distance is from two hundred to two hundred and fifty yards. He knows Artialga mound or mot. I know the present residence of Dr. Levi Jones. Dr. Jones has lived at his present place of residence since about April, 1851. His inclosure takes in said mound or mot. I know the former location of Samuel F. Harding; it was about six or eight hundred yards above said mound or mot. He has lived at said residence and back of it, since the spring of 1848; he was living there when I first knew him, which was at the time mentioned above. I have always understood that he was Dr. Levi Jones' tenant. I have each of them say so, and have heard them speak of the matter in the presence of each other. And furthermore deponent saith not.

JOHN HENRY BROWN.

Bill of Exceptions, continued.—Henry Beaumont's Deposition.

Plaintiffs then read the deposition of Henry Beaumont, taken same time and manner, and map annexed thereto, marked on the back James Simpson, United States commissioner, &c. Said deposition is as follows. Copy of said map as follows.

"I am the county surveyor of the county of Calhoun, state of Texas; the accompanying map, to which my certificate and signature is placed, is correct according to the map of the said county, and the records of my office. I know "Artialga" mound *mound*, or mott. It is situated within the inclosnre of Dr. Levi Jones' present residence. Dr. Levi Jones has lived at his present place of residence since the spring of 1851.

I have known Samual F. Harding's place of residence, since July 1850. I have known that place of residence to have been from that time, on Juan Cano league, included within the Juan Cano survey, between the lower line of said survey and Powderhorn bayou and lake; there are twenty-seven hundred acres, or about that. I have seen the lines of all that portion of the league below said bayou and lake. Beginning at the first corner of said survey, and running with its lines, there could not be obtained a league below the bayou and lake. Furthermore deponent saith not.

HENRY BEAUMONT.

[For map, marked James A. Simpson, see original, page 316.]

Santiago Gonzales. 1 *League.*

The State of Texas, County of Calhoun.

I hereby certify that this plat is correct, according to the county map of Calhoun county, and the records of my office.

HENRY BEAUMONT,
County Surveyor, Calhoun County.

INDIANOPOLA, January 26th, 1854.

Bill of Exceptions, continued.—Septon Walker's Testimony.

Plaintiffs then introduced Septon Walker, who certified as follows: I, a civil engineer and surveyor, assisted the officer of the United States Survey, Capt. ———, in ascertaining the variation of the compass; at this point, it is eight degrees fifty-eight minutes, that is, the magnetic meridian is that much farther east than the true meridian. About Cape Florida there is little or no variation; as you go east from thence, it varies to the west; as you come west it varies to the east, increasing as you proceed west: the precise ratio of increase cannot say what it is in Matagorda bay, but it is something more than here.

Cross-examined.

Being shown the diagram, or map, annexed to the original grant in this case, says it appears and purports on its face to have been surveyed by the magnetic meridian. Being shown Theelpapa's map, and Beaumont's, returned with his return of survey in this case; says he does not know how they surveyed, whether by magnetic or true courses, but would take for granted it was done by the true meridian, that being always the presumption with surveyors, in the absence of explanations, but could not say from their face, that Beaumont's map, returned with his survey, or the map annexed to grant, were surveyed by different meridians.

Re-examined by Plaintiffs.

Being shown Beaumont's map copied from the county map, witness pointed out on the map, if the survey had been according to the magnetic meridian, a point to which a change in the survey, according to the true meridian, would bring the first line (see the map). This point, however, was merely a guess by the eye, as he had no instruments present.

The first line would of course run farther to the south, and the beginning of the third line would be farther from the bay, and it would throw it farther north, in running to the bay.

Bill of Exceptions, continued.—Exhibit, depositions of R. B. Moore, James Heweston, and John W. Swartz.

Plaintiffs then read the depositions of R. B. Moore, James Heweston, and John W. Swartz, all taken January, 1854, and notice to defendants, and which are as follows.

After Carline left the house, or cabin, on the survey immediately above Powderhorn bayou, and up to the time Elam occupied it, I do not know that any person or persons occupied it permanently;

I do not think that Elam went into possession of the place until two or three months after Carline left it. The cattle-pen of Cunningham, mentioned in my former deposition, was put up some time in April or May, in the year 1851, and was removed in December of the year 1852; I have seen small craft, drawing two or three feet, some three miles above the entrance into Powderhorn lake; I have never known any steamboat enter or navigate the lake, nor have I ever known any other vessel, carrying freight, enter or navigate said lake, except oyster-boats, or wood-boats for shells; I have sounded the said lake some eight miles up, and found water at the depth in some places, of four feet, sometimes two feet, and sometimes one foot; there is a channel near the southeastern shore, extending up probably four miles, of an average depth of four feet; it is crooked, and not over seventy or seventy-five feet wide; the depth stated is at average tide, and furthermore deponent saith not.

R. B. MOORE.

James Hewestón deposition, referred to.

I know the survey made at Powderhorn by William M. Cook; I do not know whether it was on the Gwatney certificate or not, except from information some time in the year 1850; I saw Carline on the said survey, living in a cloth tent; he afterwards put up a small house from timber obtained from the wreck of a steamer called the "Jerry Smith," and moved from the place some time in the same year. Elam was the next person who took possession of the same place, and further deponent saith not.

JAS. HEWESTON.

John W. Swartz deposition, referred to.

I do not know at what time Carline left the place at Powderhorn; I was not here at the time; I do not know that any person took possession of the place immediately after he left it; Elam took possession of said place in the winter of 1851 and 1852; I was here when he went into possession. In my former deposition I stated that Powderhorn bayou was navigable for schooners, sloops, and river steamboats; I now state I did not mean the lake, but the bayou proper, before its entrance into the lake. The Dereanger boat in which I sounded the lake, drew about two feet water; I have seen said lake about the mouth of the bayou quite shallow, about a foot and a half deep; I have waded across on foot. The entrance to said lake is narrow and very crooked; I know a bayou called Blind bayou, connecting with Powderhorn lake, the mouth of which entering Matagorda bay is closed by the action of the wind and water; I have known said Blind bayou open for several years at a time, and have seen as much as four or five feet water at its mouth; its general

depth when open was about a foot, or foot and a half; its general width was about twenty or twenty-five feet. The depth of water on the bar opposite Powderhorn bayou, at average tide, is about three and three and a half feet; at low tide, in winter, it is about two, and two and half feet, and sometimes less than that; I have waded it, and found it very shallow, say a foot or a foot and a half in depth, and furthermore deponent saith not.

his
JOHN ⋈ SWARTZ.
mark.

Bill of Exceptions, continued.

Defendant Cook, by his counsel, objected that plaintiffs were also bound to read the deposition of James S. Jones, contained in the same package with the last three depositions, and taken by same officer at the same time, and embraced in same certificate; but the court overruled said objection. Plaintiffs then tendered said deposition of said James S. Jones to defendants, to read the same if he wished, and defendant read the said deposition as follows:

James S. Jones' deposition.

That William P. Milby is clerk of the County Court of Calhoun County, and I am his deputy. Mr. Milby is absent from the county, and I, as his deputy, have the custody of all the papers appertaining to the office of County Clerk, as well as all books and other records. The accompanying copy of a deed, marked A, and upon which my name is written, is a correct transcript from the records of the said County Court; and furthermore the deponent saith not.

JAMES S. JONES.

And, on agreement, defendant read in evidence the following agreement between William M. Cook and Daniel Elam, as follows:

State of Texas, County of Calhoun.

Memorandum of an Agreement this day made between William M. Cook and Daniel Elam, both of Calhoun county.

Said Cook on his part agrees to furnish the materials for the erection of an office on the lot near Powderhorn, No. 7, block No. 3, it being the same lot on which said Cook now has a small building; and said Elam on his part agrees to put up said office, and complete the same in consideration of the use and occupation of the same for 12 months from this date.

Witness our hands and scrawls for seals, this 7th day of March, 1852.

WILLIAM M. COOK, [SEAL.]
DANIEL ELAM. [SEAL.]

R. C. BRADY.

United States of America, State of Texas, District of Texas.

Be it remembered, that on this, the 9th day of July, A. D. 1853, personally came and appeared before me, W. J. Hewestón, a commissioner of the United States District Court in and for the district of Texas, R. C. Brady, by me well known, and, after being sworn, on his oath states, that William M. Cook and Daniel Elam, whose names appear to the above instrument of writing, acknowledged in his, said Brady's presence, that they signed, subscribed, and executed the same for the purposes and considerations therein stated, and that he signed the same as a witness at the request of said Cook and Elam.

[SEAL.] In testimony whereof, I have hereunto set my hand, and scrawl for seal, this day and date beforementioned.

WM. J. HEWESTON,
U. S. Com. Dist. Ct., Dist. of Texas.

The State of Texas, County of Calhoun.

Before the undersigned, clerk of the County Court, in and for the county of Calhoun, came and appeared R. C. Brady, and on oath did, and on oath declared, that William M. Cook and Daniel Elam signed in his presence the foregoing instrument, and acknowledged they done for the purposes and considerations in the same set forth and declared. And he signed the same as a subscribing witness, at the request of said Cook and Elam.

[SEAL.] Given under my hand and the seal of the County Court, at office of said court, at Indianola, the 21st day of Nov. 1853.

WM. P. MILBY,
Clerk C. C. C.

Filed for record, the 21st day of Nov. 1853, at 3 o'clock.
Recorded 5th day of Dec. 1853.

WM. P. MILBY, [L.S.]
Clerk.

State of Texas, County of Calhoun.

I, Wm. P. Milby, clerk of the County Court in and for the county of Calhoun, and State of Texas, do hereby certify that the foregoing agreement between Wm. M. Cook and Daniel Elam, dated the 7th day of March, 1852; on the reverse of this sheet is a true and correct copy of the records in my office, in Book of Deeds C, folio 411.

Witness my hand and seal of office, at Indianola, the 25th day of April, A. D. 1855.

[SEAL.] WM. P. MILBY,
Clerk C. C. C. C.

Bill of Exceptions, continued.—Charles Mason's Deposition.

Plaintiffs then read the deposition of Charles Mason, George W. Palmer, Thomas J. Poole, C. C. Heweston, J. M. Reuss, and David Lewis, all taken on notice to defendants. Said depositions are as follows:

BURNLEY & PORTER
v.
COOK and others. } No.

United States District Court, Galveston.

Interrogatories to Charles Mason, a resident of Gonzales County, to be examined on the part of the plaintiffs in the above suit.

First. Do you or not know the tract of land on and north of Powderhorn bayou, claimed by the defendant, Wm. M. Cook, which is in controversy in this suit? If so, how long have you known it, and what are your opportunities of being acquainted with the first occupation or improvements made on said tract? Please to state when Wm. M. Cook, or any person claiming under, or acting for him, first commenced the actual occupancy and possession of said land, or any part thereof; in what manner was this done, what was the character of said possession, how long continued, and in what manner; and state all facts in your knowledge to show the commencement of said Cook's possession, and the actual history and facts of the same; by what parties; what interruptions, if any, took place; and all facts in your knowledge relating to Cook's possession. Giving your means of knowledge, and state all other and further facts which will be of any service to the plaintiffs.

JONES & BALLINGER,
For Plaintiffs.

Cross-interrogatories to the witness, Charles Mason.

First. Where did you reside in the year 1847, and in each successive year thereafter, up to and including the year 1853?

Second. Did you or not know one C. Hoffman? and did he not reside on the tract of land on and north of Powderhorn bayou, claimed by defendant Cook and others, which is now the site of the town of Lower Indianola or Powderhorn, some time between the years 1847 and 1853? and at what time, and how long, did he occupy the same?

Third. Did you or not know one Carline, as a resident of and upon said tract of land? if yea, state the period and duration of his occupancy?

Fourth. State what persons were residents upon and occupants of said tract of land on and prior to the 10th October, 1850; and what improvements were made by them. Declare fully and particularly your knowledge of the truth herein.

Fifth. Have you any interest in the result of this suit? and are you in anywise connected by blood or marriage with any of the parties plaintiffs? Declare fully, and fully particularly, as to the matters herein inquired of.

L. A. THOMPSON,
For Defendants.

Commission, and copy and filing waived, and answers to foregoing original and cross-interrogatories may be taken and returned, according to the State practice, subject to all other objections.

L. A. THOMPSON,
Attorney for Defendants.
JONES & BALLINGER,
Attorneys for Plaintiffs.

Answers of Charles A. Mason.

Interrogatory 1st. I do. Since the month of January or February, 1850. I believe the first occupancy of the tract, by or through William M. Cook, was that of the Indianola Wharf Company, of which I was a member, who commenced erecting a wharf north of and near the mouth of Powderhorn bayou early in the spring of 1850; and proceeded until nearly all the posts for the pier-head were driven, when these operations were stopped by an injunction from the United States District Court at Galveston. Shortly afterwards, through an arrangement with Dr. Levi Jones, the company removed their entire material below the mouth of the bayou to La Salle, where they erected the wharf. I removed to La Salle with my goods in the last days of September, 1850. I had frequent occasions to pass Powderhorn bayou on my way to Indianola. There was no house nearer the bayou than that of Mr. Swartz. I do not remember whether or not he lived on said tract of land. A man by the name of Neal Carline and one by the name of Charles Hoffman were engaged by the wharf company for some time; they stopped at or near, and north of Powderhorn bayou, about the 20th September, 1850; kept a boat to cross persons going to La Salle, and elsewhere down in the bay, and fished; they lived at a camp. One or both of them remained there, I think, until the early part of the year 1852. They built a frame tent or awning that one or both occupied until they left, which I think was in the early part of 1852. I believe *I believe* I have heard Carline, the head man of the two, say,

he was there by the consent of Dr. Jones; that he was his tenant or as much; and did not hear to the contrary, until about the time he left there. About the time he left, and but a few days previous, I learned that he had said he was the tenant of Col. William M. Cook. Col. Cook erected the first house, near the bayou, in the year 1851 or 1852; I think, latter part of 1851: the first permanent improvement made there by him or any other person to my knowledge. Foster and Cunningham, or one of them, built a pen near and north of the bayou, for the shipment of cattle, in December, 1851, I think.

CHARLES MASON.

Answer to Cross-interrogatories.

First. Answer. I resided in the city of Austin in 1847, 1848, and until the spring of 1849, when I left for Indianola; stopped at Gonzales until the latter part of November. Settled in Indianola late in November or early in December, of the latter year. Removed to La Salle near the last, say 29th September, 1850, where I continued to reside until the spring of 1853.

Interrogatory 2d. Answer. Yes; he lived there from about the 20th September, 1850, I believe, until the latter part of 1851, or perhaps the early part of 1852; I cannot say the precise time.

Interrogatory 3. Answer. I know him. He and Hoffman were stopping together. He and Hoffman were together when I first saw them, say from 20th September, 1850. I think Carline removed some months after Hoffman left. This am not certain.

Interrogatory 4. Answer. A number of boatmen stopped at the bayou for the purpose of fishing. Do not know that they lived there. Carline and Hoffman are the only persons who resided there at that time, say 10th October, 1850, or prior to that time, while I lived in Indianola, unless a Mr. Swartz, and perhaps another German who was situated near him, occupied part or parts of said tract, if they or either of them did. The improvements were worth two or three thousand dollars, I believe. My wife, Mrs. Mason, owns one lot in La Salle. I have a title to three lots, under Cook's title, in what was formerly known as Brown's addition of Indianola, or the present Lower Indianola or Powderhorn. I have no connection with the parties, by marriage or otherwise, who are plaintiffs in this suit *who are plaintiffs in this suit*, so far as my knowledge extends.

CHARLES MASON.

The State of Texas, County of Gonzales.

Before me, Everett Lewis, a notary public in and for said county of Gonzales, personally came Charles Mason, to me well known, who in answer to the interrogatories and cross-interrogatories herewith in-

closed, and hereto appended by me, connected with the agreement to take said Mason's testimony, made his written statement, hereinbefore written above his name and signature, and sworn to and subscribed the same before me, this 15th day of May, A.D. 1859.

To certify which, I hereto place my name and official seal, the day last above named.

EVERETT LEWIS,
Notary Public.

Fee.—Notary's fee for taking testimony, $5. Paid by Stockdale, plaintiffs' attorney.

EVERETT LEWIS,
Notary Public.

George W. Palmer's Deposition, referred to above.

United States District Court, Eastern District of Texas.

BURNLEY & PORTER
v.
WILLIAM M. COOK and others. } No. 441.

Interrogatories to George W. Palmer, a witness, residing in Victoria county, Texas, to be examined *to be examined* on behalf of plaintiffs in the above suit.

First. Are you or not acquainted with the locality of the Juan Cano league of land, and the country adjacent to Powderhorn bayou, on and near Matagorda bay, in Calhoun county? If so, state how long you have known the same, where you resided, and what was the character of your acquaintance with it?

Second. Whether or not you are acquainted with the tract on said bayou, on the bay claimed by William M. Cook, the defendant in this suit, and how long you have been acquainted with it?

Third. Please state the first actual possession or occupancy of said tract of land by said Cook, or any and what person or persons claiming or holding under him; and state the nature and character of said possession, and the possession thereafter held by said Cook, and all persons claiming under him, up to the date of this suit, giving dates and facts fully?

Fourth. If you have stated the first possession or occupancy held by said Cook, or any one under him, state your means of knowledge enabling you to say there was none prior thereto; and state especially all facts tending to show whether or not one Neal Carline and one Charles Hoffman, one or both of them, held possession or occupancy of said land during the years 1847, 1848, 1849, 1850, all or any portion of that time, for or under said Cook. State the facts fully and specially.

Fifth. State all facts in your knowledge, if any, with regard to the

possession of the Juan Cano league of land, by any and all persons, under the title claimed by the plaintiffs in this case, prior to the institution of this suit, giving dates and all facts relating to the matter fully and specially.

Sixth. If you know any other or further facts which will be of service to the plaintiffs, state and set forth the same fully and particularly.

JONES & BALLINGER,
Plaintiffs' Attorneys.

In answer to the first interrogatory. That he is somewhat acquainted with the land about Powderhorn bayou, in Calhoun county, on each side of said bayou. If the Juan Cano league of land is the land formerly claimed by Jones, Burnley, and others, crossing Powderhorn bayou, I am acquainted with it. I have known that tract of land since the fall of 1848. I resided in Upper Indianola from the fall of 1848, for about four years. The character of my acquaintance was, that I purchased a portion of the tract was sued for, and sold out my claim. That was what made me know anything about it. I sold my interest, giving a quitclaim title.

To the second interrogatory he answers: I don't know what William M. Cook claims there.

To the third interrogatory he answers: I don't know of any person claiming or holding under William M. Cook; I don't know that William M. Cook had any possession until Baldridge, Sparks & Co. came there and were enjoined from building a wharf by Jones, Burnley & Co. I know rent title; that occurred after I left there, in the fall of 1852, I think.

To the fourth interrogatory he answers: That in the year A.D. 1850 or 1851, I was present at a suit before a magistrate in Indianola, in which Neal Carline was defendant in an action of forcible entry and detainer, brought by Dr. Levi Jones, for himself, Burnley & Co., which resulted against Carline's possession, and he was ejected from the place that he claimed near Powderhorn bayou. It might have been previous to the time stated. I was acquainted with Charles Hoffman, who was a dissipated, rambling person, and in the fall of 1850 commenced the confectionery business in partnership with me in Indianola, and continued with me about a year, when he left that part of the country, and I have not known of his whereabouts since; I have never heard of his occupying or claiming possession of any land in Calhoun county. Hoffman had no interest in any real property in Indianola, but only performed the labor of a confectioner. He was very fond of boating, and when not engaged, would get into a spree, and generally got aboard of some boat, and would be gone some time. From the character and habits of the man, I don't think he ever occupied land for any length of time. I think he had been

in Indianola but a short time before he commenced business with me, having left Galveston, where he had a family in business.

To the fifth interrogatory he answers: That Harding had possession when I went to Indianola, in 1848, and also had possession when I left, under the plaintiffs, as he stated [and as *it was generally understood*]. Swartz lived on the tract, I believe, but am not certain whom he claimed under, although I understood from him that he claimed under both parties, Jones, Burnley & Co., and the locator. He was there in the fall of 1848, with his family, and is still there.

To the sixth interrogatory he answers: That *that* he has stated all that he recollects that would of advantage to either party.

G. W. PALMER.

Answer of the witness, George W. Palmer, to cross-interrogatories propounded to him by S. A. White, who was present at the taking of the herewith inclosed deposition:

The witness says that he thinks a league of land on Powderhorn bayou is called the Juan Cano league, but am not certain. Thinks it is bounded on the northwest by the tract of land upon which Upper Indianola is situated, gained by White, but am not certain as to that, and am not certain as to its other boundaries. I have heard that William M. Cook made a location on that tract, but don't know it, and but very little about it. I do not know exactly the *the* boundaries of the different surveys, or their corners. I think John Swartz lives on the Juan Cano league, on a location of William M. Cook, or S. A. White. I purchased of Rev. W. C. Blair, who purchased of S. A. White; the place was unoccupied when I bought it, but had been occupied before; it was inclosed by a ditch, or dyke. Harding told me he held under Jones, Burnley & Co. Harding lived below the bayou, at a place called La Salle, about a mile and a half below the bayou.

G. W. PALMER.

Thomas J. Poole's Testimony.

I am acquainted with the land situated just above the mouth of Powderhorn bayou, in Calhoun county. I think I became acquainted with the land in the year 1848, but am certain that I knew it in 1849. I know where the present residence of John Swartz is; I do not recollect of any one living on that land below Swartz, and above the bayou, when I first became acquainted with the land; there was no human habitation between Swartz and the bayou at that time that I recollect of. I was at that time frequently on the beach, riding backward and forward on the land. The land was principally prairie land, with scrubby chapperal along the beach. I think if there had been any dwelling on the land I would have seen it. I think it is fully a mile from Swartz's to the bayou. The first I recollect of the

shanty of Carline (who was sometimes called Carrol), was in June, 1851, when the Mexico went ashore. He had a sort of shanty built of canvas and boards; a small concern. I think he did not have any of the land inclosed, or in cultivation either. Carline's occupation was fishing and oystering. I do not know about below the bayou, whether there was any one living there or not at that time. I do not know who built the first permanent structure below Swartz on the land for a residence.

The direct examination of Thomas J. Poole here closed.

When this witness was cross-examined by Henry Beaumont, Esq., as attorney for defendants.

"I rode up and down the beach merely for pleasure, and not on business, and for no specified purpose. When I first became acquainted with the land, there was no growth but some chapperal. I sometimes rode on the prairie and sometimes on the beach. I do not recollect the height of the chapperal. It might have been high enough to conceal a low tent or a very low camp.

The cross-examination here closed.

THOMAS J. POOLE.

Subscribed and sworn to before me on this, the 2d day of June, 1859.

A. H. PHILIPS, Jr.,
U. S. Commissioner.

Charles C. Heweston's Deposition.

I came here in December, 1850. On the Sunday following the 23d, my father, my brother, and myself came down here oystering, that is, to Powderhorn, out on the reef.

There was no house between Swartz and the bayou at that time. Mr. Carline was living in a tent at that time near where Col. Cook's house now is, near where the quarter-master now resides. I could not be positive whether the Baldridge wharf was commenced in the fall of 1851 or the spring of 1852. Elam's house was put up about the same time with the Baldridge wharf. It might have been put up a few months before, but I think it was about the same time the timber for the wharf was had. Mrs. Glenn's was the first put up. Elam is now dead; I helped to bury him. He died in that house. I think there were two little houses there. He never improved but the one place.

The direct examination here closed.

The cross-examination was conducted by Henry Beaumont, Esq., attorney for the defendants, and the witness testified: The Elam property, since it passed out of the hands of the administrators, has

been recognized as Col. Cook's property. A part of the buildings now occupied by the quarter-master is the one put up by Elam, which is the same now claimed by Col. Cook.

C. C. HEWESTON.

Sworn to and subscribed before me, this the 2d day of June, 1859.

A. H. PHILIPS, JR.,
U. S. Commissioner.

J. M. Reuss's Deposition.

I have lived on Matagorda bay since December, 1845, with the exception of a few months in 1846, when I was away, but not out of the State. I was for the whole of that period a resident of the old town of Indianola, until I moved down to Powderhorn, in November, 1857. Upon reflection, I will say it was in November, 1856, and not in 1857, that I went down to Powderhorn from Indianola. For the whole of that period I have kept a drug store and practised medicine. I think I have, for the whole of that time, been acquainted with the ground lying between the old town of Indianola and the bayou called Powderhorn bayou. I misunderstood the previous question at first, and thought I was asked if I was acquainted with the lines. I am well acquainted with the land. When I first knew the land, there was no one on it but Swartz, between the old town and the bayou. Swartz's house is about a mile from the mouth of Powderhorn bayou. The next residence was that of Mrs. Glenn, between Swartz's and the bayou; I mean that the next residence put up between Swartz's and the bayou was that of Mrs. Glenn, as far as I can recollect. I do not know when Mrs. Glenn's residence was put up; I think it was about the time they had the idea of commencing the Baldridge wharf. I think Mrs. Glenn's house is about three-quarters of a mile above the bayou. I do not recollect when I first saw the tent or camp of Carline near the mouth of the bayou, but it seems to me that when I first saw it, I saw a cattle-pen there. I do not recollect the facts about it, but it seems to me that that pen was the one through which Cunningham shipped his beeves. Carline's occupation was fishing, I think; I do not know anything about his inclosing or cultivating any ground. Carline had a tent or kind of hut, when I saw it, made of some bushes or something of that sort. I do not recollect of his having any fence about it. I have frequently seen Mr. Kirkpatrick, Mr. White's father-in-law, staying at White's, but I do not know where he lived. I do not know that he ever had any permanent residence on the bay. I think if he had had any permanent residence on the bay, I would have known it.

The direct examination of Dr. J. M. Reuss here closed.

The cross-examination of Dr. J. M. Reuss was then conducted by Henry Beaumont, Esq., attorney for defendants:

I cannot recollect when Baldridge's wharf was first commenced; that is the date, but Mrs. Glenn's house was put up when they first began to talk about it. I was not interested in the drug store put up at Powderhorn, and do not recollect when it was put up. I recollect the name of Elam, but cannot trace back, and do not know where he lived. I recollect there was a house built, near about where the new wharf is at present; somewhere near where Carline's tent was. I did not know at that time who were the claimants of the land upon which the houses of Swartz and Mrs. Glenn were put up. I cannot recollect when I first noticed the cattle-pen. I do not recollect of Horace Baldwin and others commencing any wharf at the mouth of Powderhorn bayou. I do not recollect that there ever was a man here of the name of Horace Baldwin.

The cross-examination of witness here closed.

Upon the re-examination he testified as follows:

I do not know whether or not Elam's was put up after the time of Baldridge's wharf was commenced, nor whether or not it was put up about that time. I do not recollect of any more than one house put up by Elam, in Powderhorn, up to the time of his death. That is, I do not recollect whether this one was put up by Elam or not; as I stated before, I recollect something about Elam, but am not certain. I believe that Elam is dead; I recollect, now, he is dead.

The examination of the witness here closed.

J. M. REUSS.

Sworn to and subscribed before me, this 25th day of June, 1859.

A. H. PHILIPS, Jr.,
U. S. Commissioner.

John Swartz, Senr.'s, Deposition.

I live on Matagorda bay, about a mile above Powderhorn bayou. I have a deed of conveyance to the land I live on, from Mr. S. A. White. I have but one deed of conveyance from him; it is recorded in the clerk's office of Calhoun county. You can get a copy of the deed if you want to annex it to the deposition. I want to keep mine. I have another deed from John Henry Brown, as agent of Mr. White. In laying off the town the line ran through my land, and I made an exchange by taking six lots, in place of twelve. I took the six where I live now; the others laid on one of the front streets. To the third, my residence is on the land conveyed to me by White. I put up a house below where I live, in 1852; that was the first house for Mrs. Glenn. There was at that time a sort of shanty down at the bayou, half shanty and half tent. That was the only structure between my house and the bayou, until I put up the house for Mrs. Glenn, that I recollect of. Mrs. Glenn's house was put up on a lot conveyed to her by Brown. The shanty

I spoke of, was put up by Neal Carline. Charley Hoffman used to be there; I do not know which put up the tent. It is more than I can tell what Carline's occupation was; he used to be fishing and drinking, and picking up wrecked goods whenever there was a storm. I knew Daniel Elam well; I do not know when he put up his house; I kept no dates about these things. He bought the establishment that was there before he put up a house. He bought that, whatever it was, house or what; that is, I think he did, but am not certain. I don't recollect anything about it, if he had any more than one.

The direct examination here closed.

The cross-examination was conducted by Henry Beaumont, Esq., attorney of the defendants, when the witness testified as follows:

I came here in December, 1844; I did not get a title that year. I came out to work for Prince Solmes, in December, 1844. I could not tell when I got the deed from S. A. White. He gave me some writing, I forget what they called it, in which White promised to give me the land. Both White and Dr. Jones persuaded me to stay. I wanted to go to Galveston after I put up the houses for the German *German* association, but they persuaded me to stay. I expected that White's title was good all the time, but Dr. Jones promised to give me a title if he gained the land. They were both together at my house one day, when Dr. Jones promised to give me a title in case he gained it.

I got a deed from White, and have been living on the land ever since. Mrs. Glenn's house was put up in April, 1852. I believe I had just got it done before that big storm in April, 1852. I do not recollect whether Elam's house was in the course of construction about the same time as Mrs. Glenn's or not. It might have been, but I don't recollect. I don't recollect of Elam's saying anything to be about building a cistern for him. I know that there were posts delivered at the bayou, but do not recollect the date. It was long before the Baldridge wharf was built. I do not know how long, but it was before that, I know. The posts were carried away by the June storm, 1851. I do not recollect for whom the posts were delivered. There was a company of them about to start a wharf. I can't recollect the name now. Mason, I believe, was one of them. John Henry Brown, I think, was one of them. I refer to the company which was concerned in building a wharf which was afterwards taken to La Salle; the one in which Mason and Brown were concerned. I cannot tell whether the posts above-mentioned were delivered for Mason and Brown or not. There were posts that came here at different times, but I do not recollect which used them. I understood that Col. Cook got posts here once, but I may be mistaken. Am not certain; they were brought here in his name, I understood. I was so informed. I think the Colonel himself told me they belonged to him. I do not recollect the date when the Baldridge wharf was built.

The cross-examination here closed.

Upon the re-examination, the witness testified as follows:

They started a wharf at the bayou once before the Baldridge wharf was built. No wharf was ever completed before the Baldridge wharf. The one that was started was the one began by Mason and Brown, and afterwards removed to La Salle.

JOHN SWARTZ.

Sworn and subscribed before me on this the 25th day of June, 1859.

A. M. PHILIPS, JR.

David Lewis's Deposition.

That he is postmaster at Indianola, Calhoun county. In the latter part of the year 1849, I was first at Powderhorn bayou. There was no house or dwelling below John Swartz's at that time. I surveyed a portion of the town plot for Brown and others in the year 1850, when the building of the wharf was contemplated. About that time Carline was living near the mouth of the bayou, in a tent. The building of the wharf was stopped by an injunction from the Federal Court. Carline was a boatman without family, and had none of the land in cultivation. About the time of the commencement of the wharf by Baldridge, Sparks & Co., the first houses were erected on the land, between Swartz's and the bayou. Not since the fall of 1849 have Kirkpatrick or White lived on the land in controversy. There was no residence below Blind bayou or Moore's residence, which is about one mile and a half above Powderhorn bayou, but Swartz and Seibold's, in 1849, when I first visited the place. Further deponent saith not.

DAVID LEWIS.

Jerry Smith's Evidence.

Plaintiff then introduced Capt. Jerry Smith, who testified that he was for many years connected with the New Orleans line of steamers. The steamship Mexico went ashore at the mouth of Powderhorn bayou, between the 15th of June and the 1st July, 1851. Lay there two months before she could be got off. The steamboat Jerry Smith was wrecked there in the same storm. The Palmetto was wrecked at the entrance to Matagorda bay, on the 8th day of January, 1850, about eighteen miles from Powderhorn, air line. She grounded at Powderhorn in 1849. Lay there two or three days. Never knew or heard of the Telegraph grounding or going ashore at Powderhorn. She went aground at Gallinipper bar, between Lavaca and Indianola, six or eight miles from Powderhorn.

George Mason's Evidence.

Plaintiff then introduced as a witness George Mason, Esq., who

testified that, on the 5th day of August, 1854, he became the agent of a number of the parties claiming the land in controversy above Powderhorn bayou, by which he was authorized to make sales of town lots, conveying the title of all parties, and hold the proceeds, subject to the result of the litigation. The claimants have united in the powers to witness. Col. Cook was the last one to come in, which he did in Feb., 1855. Witness made his first sales in March, 1855.

Bill of Exceptions, continued.—Benito Morales Grant in Spanish.

Plaintiffs then offered the testimonio in Spanish of a grant to Benito Morales, and translation of the same, as tending to explain the boundaries of the grant in controversy, and the upper line thereof and its termination; to which the defendants objected, because the said grant to Benito Morales was not in controversy in this case, and was not admissible in evidence, for any legitimate purpose. But the court overruled the objections, and admitted the same to be read in evidence; to which defendants excepted. Said grant and translation are as follows:

Grant to Benito Morales.

Sello Segundo. Doce Reales.

Parales anos de mil ochocientos veinte y seis y ochocientos veinte y siete, 28, 29, 30, 31 y 32.

FLORES.

Habilitado para el ano de 1838.

GARCIA.

Presentacion.

Senor Comisionado: Benito Morales, cusado y con familia ante V. en la mejor forma que haya lugar en derecho se presenta y dice: Que siendo ejectibo que es unos de los colonos admitidos por el empresario actual y hayandose sui el titulo de posecion del terreno que le corresponde como a tal poblador a V. Vecurro para que resando de la facultad que le concede la ley. Le sin ba otorgar la medida y entenden le el titulo de un sitio de tierra que esta situado sobre la banda occidental de la Laguna de Mata Gorda colindante per el sud. Este con el sitio que le medio para Juan Cano el mismo que es baldio y de ello recivire justicia. Guadalupe Victoria, Marzo veinte y siete de mil ochocientos treinta y cinco. Benito Morales.

Decreto al Empresario.

Villa de Guadalupe Victoria veinte y siete Marzo de mil ochocientos treinta y sinco. Pare esta uistancia al Cindadano Placido Be-

navides para que informa a continuacion si es efectibo ó no la que esposa el interesado y la debuelba. Leon.

—— del Empresario.

Senor Comisionado: In atencion al anterior decreto de V. dijo: Que el solicitante es uno de los colonos admitidos por mi para poblar los terrenos que anterior ha demandado el Lupino Gobierno del Estado y tiene las colidantes que la ley prebiene por lo que es considero acridor a la gracia que pide y por que el terreno que solicita es valdio y no perjudica a corporacion in tercero alguno siendo quante tuvo que decir a V. sobre el particular. Guadalupe Victoria Marzo veinte y ocho de mil ochocientos treinta y cinco. Placido Benavides.

Decreto al Ayuntamiento.

Villa de Guadalupe Victoria Marzo de mil ochocientos treinta y sinco. Al Agreviensor Cindadano Santiago Kerr para que practicando scientificamente las medidas que se solitan anote a continuacion las correspondientes al interesado y la debuelba. Leon.

Notas de Medidas.

Senor Comisionado: El terreno que se medio para Benito Morales, segun el decreto de V. esta situado sobra la Laguna de Mata Gorda per la margen occidental: Corucusando de una estaca que esta sobre la barranca de dicha laguna la que es cuarta y ultima majorura del sitio que le medio a Juan Cano y primera de esta medida: y de alli al sur cuerenta y cinco grados oeste con la Cinca de dicho cano sinco mil siento cuerenta varas a la tercera majonera del ya sitado Cano y de Faustino Alvirado.

[Here follows map. See original, p. 354.]

Sello cuarto. Una cuartilla.
Para el bienio de 1832 y 1833, '34 y '35.

GARCIA.

Y siguiendo lamisma linia con el fondo de Albirado tres mil quinientas veinte y una varas a la segunda majonera del sino dicho Albarado y tercera del sitio q. se midio á clito Garcia. De alli la misma linea con el Fondo de clito Garcia hasta su segunda majonera tercero de Pedro Garcia corrio tres mil quinientas treinta y siete varas. Y de alli siguiendo la misma linea con el fondo del yá sitado Pedro Garcia dosientas setenta varas á donde se puro una estaca en el llano para la segunda majonera de esta medida. De alli al Norte cuerenta y sinco grados oeste cuatro mil ocho cientas vehenta varas á donde

se puro otra estaca en el llano para la tercera majonera de esta medida. De alli al norte cuerenta y sinco grados este ocho mil cuatre cientos veinte y seis varas á la tercera majonera de Don Francisco de Leon y sirbe de cuerenta majonera de esta medida. De alli al sur cuerenta y cinco grados este con el fondo de dicho Leon dos mil ocho cientos sincuenta varas á la segunda majonera del referido Leon y sirbe de quinta majonera de esta medida. De alli con la linia del sino dicho Leon al norte cuerenta y cinco grados este cuatro mil seis sientas vehenta y siete varas á la primera majonera del sitado Leon que es sesta y ultima majonera de esta medida que es una estaca que esta fijada sobre la orilla de la laguna Madre ya sitada. Y al sur cuarenta y sinco grados oeste queda una horia que se nombra de Juan McTenere á setenta varas de distancia. Y de alli siguiendo las bueltas de la laguna hasta el punto de comensan se completó una urea de cincuenta miliones de varas cuadradas hiqual a un sitio de tierra de Agostadero per estar lomenos en su mitad vuenpada per valuas saladas siendo su configuracion loque representa el mapa que por duplicado accompano a V.

SANTIAGO KERR.

Probiedo del Comisionado.

Librese al presentante titulo de propiedad para que por medio de el posea y disfrute el terreno que pide con arreglo a las leyes: Poreste auto asi la probeo, mando y firmo con dos testigos de un asistencia en esta dicha villa de Guadalupe Victoria á los once dias del mes de Abril del ano de mil ochocientos treinta y sinco. Lo que certificó. Fernando de Leon. De asistencia, Francisco de Cardenas. De asistencia, Bonifacio Rodriguez.

Titulo de Posecion.

Fernando de Leon, Comisionado per el Supremo Gobierno del Estado de Coahuila y Tejas, para el repartimiento y posecion de tierras valdias a los colonos introducidos por el.

Sello cuarto. Una cuartilla.

Para el bienio de 1832 y 1833, '34 y '35.

GARCIA.

Empresario cuidadano Martin de Leon á vistud de su primera contrata con el consentimiento y aprobacion del Excellentissimo Senor Vice Presidente de la Republica communicada por el Svio de Velaciones el Excellentissimo Senor Gobernador del Estado y pasada en dies de Marzo de mil ochocientos treinta y dos al Senor Gefe Politico de este departimiento y á los que ha de introducir á vistud de su segunda contrata entre el Rio de la Caca y el Arroyo del Colito. Por cuanto Benito Morales casado y confamilia es uno de los colonos com-

prendidos en las contratas de dicho empresario y tiene las canlidadas que demanda la ley de colonizacion de veinte y cuatro de Marzo de mil ochocientos veinte y sinco y las instrucciones de las comisionados de fecha cuatro de Septiembre de mil ochocientos viente y siete y segun el informe q. ha dado el dicho cindadano empresario interrino. En el nombre del estado le consedo y meto en posecion efectiba y personal de un sitio de tierra que es el mismo que solicita y cuyos linderos estan demandados en el mapa y notas de medidas presentadas por el agrimensor cindadano Santiago Kerr. Como se le en este espediente: dicho terreno es de agastadero segun su situacion y localidad conforme a la que deberá pagar al estado la cantidad de treinta pesos loque por via de veconocimiento esta marcado en el articulo veinte y dos de la indicada ley de la colonizacion bajo las penas alli establecidas: Quidando entendido que dentro de un ano hade construir majoneras de cal y canto en cada angulo del terreno: Que la hade ocupar y cultibar segun la dispuesta en la referida ley: Que amplira escrupulosamente an todo loq. en ella ordena y que jamas lopasara á manos muertas. Por lanto usando de las facultades que mi son comodidas per la ley y instrucciones consiquientes espido el presente titulo y mando se sague testimonio de el y se le entregue al interesado para que posea y disfrute el terreno que se le ha consedido el, sus hijos herederos, y sucesores ó quien de el ó de ellos derecho hubiere ó action representare per ser asi la voluntad del estado. Es dado en la Villa de Guadalupe Victoria á los onee dias del mes de Abril del ano de mil ochocientos treinta y cinco firmardo per mi con das testigos de un asistencia corforme á la ley. Fernando de Leon. De asistencia, Francisco de Cardenas. De asistencia, Bonifacio Rodrigues.

Concuerda consu original que queda en el archivo de esta colonia de donde lamande sacar hoy dia de su entrega en cuatro fogas utiles larimpera y ultima en papel de sello segundo y los vestantes en el de sello cuarto y á su contestacion y correccion se hagaron presentes de testigos instrumentales los ciudadanos Isidro Benavides, Felix de Leon, and Luciano Navarro, a mas de los de mi asistencia con quienes actuo en la forma de derecho. Entre reglores fondo de vale certifico.

FERNANDO DE LEON.

De assistencia,
FRAN'CO DE CARDENAS.
De assistencia,
BONIFACIO RODRIGUEZ.

Translation of Benito Morales' Grant.

To the Commissioner.

I, Benito Morales, being a married man, and having a family, in the best legal form permitted, appear and say that, being actually

one of the colonists admitted by the present Empresario, and being without a title to the land that corresponds to me as such a settler, I hereby apply, exercising the power granted you by law, you may be pleased to authorize the survey, and extend a title to one sitio of land, and situated on the west bank of Matagorda lake (bay), adjoining on the southeast the sitio surveyed for Juan Cano,—the above being vacant land, and whereby I shall receive justice.

BENITO MORALES.

GAUDALOUPE VICTORIA, March 27th, 1835.

GAUDALOUPE VICTORIA, March 27th, 1835.

Pass the petition to Placido Benavides, for him to inform in continuation whether what is set forth by the person interested be the truth, and return the same.

LEON.

To the Commissioner.

In addition to your foregoing decree, I hereby state that the petitioner is one of the colonists admitted by me for the lands traced out by the executive department of the State to my predecessor, and possesses the qualifications the law provides; for which reason I consider him entitled to the favor he requests, and because the land he solicits is vacant, and he does not injure any corporation or third person, which is all I have to state upon the subject.

PLACIDO BENAVIDES.

GAUDALOUPE VICTORIA, March 28th, 1835.

GAUDALOUPE VICTORIA, March 28th, 1835.

To Santiago Kerr, surveyor, to execute scientifically the survey requested, and note down in continuation that corresponding to the person interested, and return this instrument.

LEON.

To the Commissioner.

The land surveyed for Benito Morales, in obedience to your orders, is situated upon the lagoon of Matagorda, on the western margin, commencing at a stake upon the deep break of said lagoon, being the fourth and last landmark of the sitio surveyed for Juan Cano, and the first of this survey; thence south forty-five degrees west, with the line of said Cano, five thousand one hundred and forty-seven varas, to the third landmark of the aforewritten Cano and Faustin Alvarado; and following said line, with the depth of Alvarado's, three thousand five hundred and twenty-one varas to the second landmark of the aforesaid Alvarado, and third of the sitios surveyed for Clito Garcia; thence the same line with the depth of Clito Garcia to his second landmark, and third of Pedro Garcia,—the line running three thousand five hundred and thirty-seven varas; thence

following the said line, with the depth of the aforementioned Pedro Garcia, two hundred and sixty varas, where a stake was driven in the plain for the second landmark of this survey; thence north forty-five degrees west, four thousand eight hundred and eighty varas, where another stake was driven in the plain for the third landmark of this survey; thence north forty-five degrees east, eight thousand four hundred and twenty-six varas, to the third landmark of Don Francisco Leon, and it serves *of* the fourth landmark of this survey; thence south forty-five degrees east, with the depth of said Leon, two thousand eight hundred and fifty varas, to the second landmark of the aforementioned Leon, which serves as the fifth landmark of this survey; thence with the line of the aforementioned Leon, north forty-five degrees east, four thousand six hundred and eighty-seven varas, to the first landmark of said Leon, which is the sixth and last landmark of this survey, being a stake driven on the bank of the aforementioned main bayou (lagoon Madre), and south forty-five degrees west, at the distance of twenty varas, there is a chain well, John McTenere's well; thence following the bends of the lagoon to the place of beginning, completing an area of fifty millions square varas, equal to one sitio of land, grazing land, because one-half of it at least is occupied by Saline bay; the shape of said land being as represented in the map, which I herewith accompany you in duplicate.

SANTIAGO KERR.

Title shall issue to the applicant that by means thereof he may possess and enjoy the land he requests according to law. By this decree I so provide, order, and sign with my two assisting witnesses, in this the said town of Gaudaloupe Victoria, on the 11th April, 1855, which I hereby certify.

FERNANDO DE LEON.

Attesting witness: FRANCISCO DE CORDOVA,
Attesting witness: BONIFACIO RODRIQUEZ.

Fernando De Leon commissioned by the executive department of Coahuila and Texas, for distributing and giving possession of lands to the colonists introduced by the Empresario, Martin De Leon, in virtue of his first contract, with the consent and approbation of his excellency, the Vice-President of the Republic, communicated by the secretary of this State, and passed on the 10th of March, 1832, to the political chief of this department, and to those he is to introduce by virtue of his second contract between the river Lavaca and Colito creek. Whereas, Benito Morales, a married man, and having a family, is one of the colonists comprised in the contracts of said Empresario, and possesses the qualifications required by law, the colonization of the 24th of March, 1826, and commissioner's instructions of September 4th, 1827, and agreeably to the report of the said Empresario, *ad interim*. In the name of the State I hereby grant,

and put him into actual and real possession of one sitio of land, being the same which he solicits, and whose boundaries are marked out in the map and notes of survey, presented by Santiago Kerr, surveyor, as appears in this dispatch. Said land, agreeably to its locality and situation, is grazing land; and conformably thereto, he must pay the State the sum of thirty dollars, marked out as acknowledgment in the 22d article of the aforementioned colonization law, under the penalties therein established; it being understood that, within one year, he must construct landmarks of stone and lime upon each angle of the land; he must occupy and cultivate the same, agreeably to the provisions of the aforementioned law; that he shall scrupulously fulfil all that is therein ordained, and shall never transfer it in mortmain. Therefore, exercising the power granted me by the law and consequent instructions, I hereby issue the present title, and order an attested copy thereof to be taken and delivered to the person interested, that he may possess and enjoy the land that has been granted him, himself, his children, heirs, and successors, or whoever from him or them should have a right, or represent an action. For such is the will of the State.

Given at the town of Gaudaloupe Victoria, on the 11th of April, 1835, signed by myself, together with my two assisting witnesses.

FERNANDO DE LEON.

FRANCISCO DE CARDENAS,
BONIFACIO RODRIGUEZ.

A true copy of the original remaining in the archives of this colony, from which, on this date of delivery thereof, I ordered it to be taken on four available leaves, the first and last on paper of the second seal, and the rest upon that of the fourth; and in the act of comparing and correcting, were present, as instrumental witnesses, Isadro Venavides, Felix De Leon, and Lucinda Navarro; besides my assisting witnesses, with whom I act in legal form. I hereby certify.

FERNANDO DE LEON.

Assisting witness: FRANCISCO DE CARDENAS,
Assisting witness: BONIFACIO RODRIGUEZ.

In the town of Gaudaloupe Victoria, on the 27th of May, 1835, before me, Diego Garcia, primary judge of said town, personally appeared Benito Morales, whom I hereby certify that I know, and stated that he cedes, in entire legal form, in class of sale, to Leonardo Mauro, a sitio of land adjudicated to him as a colonist of the Empresa- of Martin De Leon, being the same expressed in the title by him, in attested copy, on the 11th April last; which document it is his will should pass to the possession of said Mauro, as accrediting the sale by him stipulated to said Mauro, in consideration of his having received in his own hands and to his entire satisfaction, the sum of four hundred and ninety-six dollars, the value of said sitio,

and of his remaining and binding himself responsible to pay to the State the sum of thirty dollars assigned, as acknowledgment to said title, which he must pay in conformity to the provision of the law of the 24th of March, 1825, and to fulfil every duty imposed in said law. The exponent, on his part, renouncing every dominion, action, right, pre-eminence, prerogative, which, by virtue of said concession and title he possessed, himself, his children, heirs, and successors, over the land therein specified, ceding them all to the aforementioned Mauro, according to the 36th article of the law of the 26th of March, of the year last past, and for defence of the aforementioned Mauro, he formally renounces all the laws that may be in his favor, including that of retraction and recantation; that it is his will that to this document no other interpretation should be given than that which it literally expresses, and should any be given it, that it may be in favor of the aforementioned Mauro; and also should any omissions of formalities or expressions be observed, they should all be considered as inserted; and that, should it be considered that the aforementioned sitio is worth or may be worth more than the aforementioned sum, he renounces the excess in benefit of the purchaser, and makes him free and spontaneous donation of all it may be, exonerating him from all responsibility. And for the validity and force of this document, and not being able to sign his name, the vendor made the sign of a cross, myself signing, the said Mauro, and the two assisting witnesses with whom I act in legal form. I hereby certify.

DIEGO GARCIA,
BENITO MORALES,
LEONARDO MAURO.

Attesting witnesses: JOSE MARIA ESCALERA,
ALEXO PERCY.

A true copy, from the original writing, in the archives, under my charge, from which on this, the day of delivery thereof, it was ordered to be taken; and in the act of comparing and correcting, were present, as instrumental witnesses, Sylvester de Leon, Bonifacio Rodrigues, and Francisco de Cardenas, besides my assisting witnesses with whom I act, from default of notary public, there being none in the manner the law provides.

DIEGO GARCIA.

Assisting witness,
JOSE MARIA ESCALERA.
ALEXO PERCY.

Bill of Exceptions, continued.—Deed from William M. Cook to Mrs. Harper.

Plaintiffs then read a certified copy of deed from defendant, Wm. M. Cook, to Mrs. Harper, as follows:

William M. Cook, Deed. Emily Harper.

The State of Texas, County of Calhoun.

Know all men by these presents, that I, William M. Cook, of the State and county aforesaid, for, and in consideration of the sum of two hundred dollars, to me in hand paid by Mrs. Emily M. Harper (the receipt whereof is hereby acknowledged), have bargained, sold, and delivered, and by these presents, do bargain, sell, and deliver, unto the said Mrs. Emily M. Harper, her heirs and assigns, the following described property, to wit: Lots one, two, seven, and eight, in block twenty-eight, as shown on the plan of Brown's addition to Indianola; also lot number seven, in block number three. And I, the said Wm. M. Cook, hereby covenant and agree to and with the aforesaid Mrs. Emily M. Harper, and her heirs and assigns, to have and to hold the aforesaid parcel of land, unto the said Mrs. Emily M. Harper, her heirs and assigns, forever. To have and to hold the same as fully and completely as I myself might or could do, by virtue of said deed of conveyance. (Erasures in 8th, 9th, 10th, 11th, 12th, 13th, and 17th lines before signing), together with all the rights, privileges, and hereditaments thereto belonging, or in any wise appertaining to the same.

JOHN HENRY BROWN.
JAMES K. DRAPER.

In testimony whereof, I have hereunto set my name and (scrawl) seal on the 26th day of July, A.D. 1851.

WILLIAM M. COOK. [L. S.]

State of Texas, Calhoun County.

I, John Henry Brown, notary public in said county and State aforesaid, hereby certify, that William M. Cook, to me well known, this day signed, sealed, and delivered the foregoing deed to Mrs. Emily M. Harper, in my presence, and declared that he did so for the purposes and considerations therein set forth.

Witness my hand and seal of office in Indianola, on this the 26th day of July, A.D. 1851.

[L. S.]

JOHN HENRY BROWN,
Notary Public.

Filed the 14th day of June, A.D. 1852, at 8 o'clock, P.M. Recorded the 15th day of June, 1852.

WM. P. MILBY,
Clerk.

The State of Texas, County of Calhoun.

I, Joseph B. Burke, clerk of the County Court of the county

aforesaid, do hereby certify that the foregoing pages contain a true and perfect copy of the original record of a deed, entitled, "William M. Cook, deed, Emily M. Harper," as the same is entered of record in Book B, p. 450, belonging to the archives of my office.

As witness my hand and the seal of the County Court of said county, at office at Indianola, this 6th day of June, A.D. 1859.

[L. S.]

JOHN B. BURKE,
C. C. C. C.

Bill of Exceptions, continued. Also deed from B. Behner to Daniel Elam, as follows.

Deed from B. Behner to Daniel Elam.

B. Behner, Deed to Daniel Elam.

State of Texas, Calhoun County.

Know all men by these presents, that Benedict Behner, of the county and State aforesaid, for and in consideration of the sum of three hundred dollars, for which the vendee's note is this day given, bearing interest at eight per centum from this date, and payable in twelve months, the receipt of which is hereby acknowledged, have this day bargained, sold, and conveyed, and by these presents do bargain, sell, and convey unto Daniel Elam of said county and State, lot No. 7, in block No. 3, according to Smyth's map of Brown's addition to Indianola, to have and to hold the same to the said Elam, his heirs and assigns, forever. And I do further covenant, that I will forever warrant the title to said lot, to the said Elam, his heirs and assigns, against the claims of all persons claiming by, through, or under me.

In witness whereof, I have hereunto set my hand in presence of and (scrawl) for seal, this 16th day of April, A.D. 1853.

B. BEHNER. [L. S.]

D. S. WOODWARD.
C. A. HARPER.

State of Texas, County of Calhoun.

Before the undersigned, clerk of the County Court, in and for the County and State aforesaid, came and appeared B. Behner, who to me is known, and acknowledged he signed, sealed, and delivered the foregoing deed, as his own act and deed, for the purposes and considerations in the same set forth and expressed.

[SEAL.] Given under my hand, and the seal of the County Court, at office of said court at Indianola, the 3d day of May, A.D. 1853.

WILLIAM P. MILBY,
Clerk C. C.

Filed for record the 3d day of May, A. D. 1853, at 10 o'clock, A. M.

Recorded the 4th day of May, A. D. 1853.

WILLIAM MILBY,
Clerk C. C.

State of Texas, County of Calhoun.

I, John B. Burke, clerk of the County Court of the county aforesaid, do hereby certify that the foregoing pages contain a true and perfect copy of the original of a deed, entitled "B. Behner, Deed to Daniel Elam," as the same is entered of record in book B, page 180, belonging to the archives of my office.

As witness my hand, and the seal of the County Court of said county, at office at Indianola, this 6th day of June, A. D. 1859.

[SEAL.] JOHN B. BURKE,
Clerk C. C. C. C.

Bill of Exceptions, continued.

Also, deed from Parish & Woodward to defendant Cook, as follows:

Edward Parish and W. H. Woodward, Deed to Wm. M. Cook.

Know all men by these presents, that we, Edward Parish and William H. Woodward, of the county of Calhoun and State of Texas, for and in consideration of the sum of five hundred and seventy-five dollars, to us in hand paid, the receipt whereof is hereby acknowledged, have this day bargained, sold, aliened, and conveyed unto William M. Cook, of the county and State aforesaid, lots No. two (2) and seven (7) in block No. three (3) according to Smyth's plan of Indianola, to have and to hold the same, together with all and singular the appurtenances thereunto belonging or in anywise appertaining, to the said Cook, his heirs and assigns, forever. And we do hereby warrant and defend the title to the said lots to the said Cook, his heirs and assigns forever, against the lawful claim or claims of any and all persons whatever, claiming or to claim by, through, or under us. The above described lot, No. 7, is the same bought from Edward Parish from the estate of Daniel Elam, deceased.

In testimony whereof, we hereunto set our hand, and scrawls for seals, this 22d day of August, A. D. 1855.

EDWARD PARISH, [SEAL.]
W. H. WOODWARD. [SEAL.]

The State of Texas, County of Calhoun.

Before me, William P. Milby, clerk of the County Court in and for the county of Calhoun, personally came and appeared Edward

Parish and W. H. Woodward, to me well known, and acknowledged that they signed, sealed, and delivered the deed foregoing to William M. Cook, for the purposes and considerations in the same set forth and expressed.

[SEAL.] Given under my hand and seal of the County Court, at office of said Court at Indianola, the 23d day of August, A. D. 1855.

WM. P. MILBY,
Clerk C. C. C. C.

Filed for record on the 23d day of August, A. D. 1855, at 5 o'clock P. M.

WM. P. MILBY,
Clerk C. C. C. C.

Recorded August 24th, 1855, in book D., folio 505.

WM. P. MILBY,
Clerk C. C. C. C.

The State of Texas, County of Calhoun.

I, John B. Burke, clerk of the County Court for the county aforesaid, do hereby certify that the foregoing pages contain a true and perfect copy of the original record of a deed entitled Edward Parish and W. H. Woodward, deed to Wm. M. Cook, as the same is entered of record in book D., page 505, belonging to the archives of my office.

As witness my hand, and the seal of the County Court of the said county, at office at Indianola, this 6th day of June, A. D. 1859.

JOHN B. BURKE,
Clerk C. C. C. C.

Bill of Exceptions, continued.

Plaintiffs also offered in evidence a copy of a deed from Wm. M. Cook to John Henry Brown, it being agreed by counsel that the same is Exhibit N., filed with the answer of the defendants in the injunction suit against building a wharf at Powderhorn, instituted in this court on the 8th day of April, 1850, in which A. T. Burnley is complainant, and John H. Brown, John F. Sequi, Charles Mason, D. McDonald, Chambers Etter, Charles A. Ogsbury, James D. Cochrane, William Dawley, and Levi Jones are defendants; and that the same is therein pleaded and set up by said defendants (except Jones) as the title on which he entered on said premises, and claimed the right to build the wharf. In order to prove said deed to be a correct copy from the original, plaintiff called the witness, John F. Sequi, heretofore sworn as a witness for defendant, who certified that he knew nothing about Exhibit N., or the original deed; that he never read said answer, or heard it read, or knew its contents; that said

answer was brought to him, and he was told he must sign it; it was an answer to defend the chancery suit in the Federal court. He signed the *jurat* to the answer copied in his previous evidence, but never made oath or knew the contents of the answer.

It was then agreed by counsel to be true, that after the rendition of a decree in said injunction, suits perpetuating the injunction against the defendants therein, claiming under the title of Cook, that on the 29th day of March, 1851, a motion for an attachment was made in this court, to commit the said Cook and others for a contempt, in violating said injunction. It being charged that said Cook was a privy to the former defendants, in which proceedings supplementary to said injunction suit, the said Cook made and filed in said court, an affidavit, on the 20th day of June, 1851, as follows, to wit:

Affidavit of Cook.

BURNLEY
v.
BROWN and others.

The said Cook further answering, says, that he recollects very little about the circumstances and contents of his arrangement with Brown and others; the wharf project was commenced by an arrangement with Brown and Samuel A. White, who supposed his own location embraced the Point. This deponent was not consulted, and gave no authority; and if he said anything, it was that he would not be in the way of any enterprise. That after the injunction suit was commenced, one of the wharf company, McDonald, came to deponent in his sick-room, and proposed that they should be allowed to plead his outstanding title, which this deponent agreed on, and wrote his attorney to insist on making him a party, and using his location as an outstanding title. Brown then agreed to give him, Cook, one-half D. N. White's survey adjoining, for one undivided half of deponent's survey in question. Deponent gave him some kind of conveyance; but afterwards, finding that Brown had no interest in the White location, the arrangement was cancelled, Brown returned him his deed, and (a word illegible) reconveyance, which he supposes to be the same filed by deponent; although he never noticed the reservation, until he heard it read here. The arrangement was wholly conditional, and dependent on the enterprise; this and what Cook was to receive, having failed, the whole was abandoned, and deponent remitted back to his original title. Deponent don't remember what conveyances, if any, were made to the wharf company, or any of the original defendants. One thing he is certain of, they were conditional, and dependent on going on with the enterprise. They, the said company, afterwards colluded with Jones, without consultation with deponent, removed their timbers to La Salle, and joined the

rival enterprise, and every of them have at all times protested that they had no interest in the land, and solemnly declared to him that they did not intend to affect deponent's right by the compromise. All parties considered the claim of the wharf company, and all claim to the lots bargained to them, renounced by the abandoning the property. This deponent claims, by virtue of his location and survey, a location made in 1847; and he insists that he is remitted back to his original title. He positively denies, upon his best information and belief, that either Jones or Burnley have valid title to the property in question. And this deponent refers to his original answer to the rule, and again denies Jones's authority thus to harass him, and insists on his authority being produced. This deponent respectfully disavows all intention to commit a contempt to any lawful order of this court; but respectfully insists that there is no equity in the original bill, and prays to be hence discharged with his reasonable costs, deponent declining all further answer to the interrogatories, unless specially required by the court to answer some distinct question.

WILLIAM M. COOK.

Sworn to and subscribed before this 20th June, A.D. 1851,
JOHN S. JONES,
U. S. Commissioner.

Which said affidavit the plaintiff read in evidence to the jury in this case.

Plaintiffs also read in evidence, the agreement of counsel, on file in this case, No. 8.

Agreement, marked No. 8.

In the District Court of the United States, District of Texas, at Galveston.

BURNLEY & PORTER
v.
WM. M. COOK and others.

The parties, by their attorneys, agreed that the testimony taken, and agreements of counsels made in the former Burnley cases (Burnley *v.* S. A. White and others, &c.), in which we are counsel, so far as the same relates to any other matter or thing applicable to this case, may be used by the parties and shall have effect, saving all exceptions to the nature of the testimony.

Filing and notice of the title deeds were read, and notice accepted to procure originals, of which copies are on file in this case, or any of

the other Burnley cases, which the parties may wish to use as evidence, filing a notice of the defendants' transfers waived.

GALVESTON, February 10th, 1854.

WILLIAM P. BALLINGER,
For Plaintiffs.

GEO. W. PASCHAL,
Attorney for Defendants, served with process.

And thereafter the plaintiffs offered as evidence the said copy of deed from said Cook to Brown, being Exhibit N., as aforesaid. But said defendant Cook, by his counsel, objected to the admission of said instrument, on the following grounds.

First. That said Cook was not a party defendant in said suit at the time said exhibit was filed, and is not bound by the act of the defendants therein in filing papers and making statements in their answer.

Second. Said exhibit does not purport to be a copy of any deed made by him, said Cook. But the court overruled said objections of defendants, and permitted the same to be read in evidence to the jury, as follows:

Copy of Deed from William M. Cook to John Henry Brown, Exhibit N. referred to.

Know all men by these presents, that I, William M. Cook, of the county of Calhoun and State of Texas, in consideration of the sum of one thousand dollars to me paid by John Henry Brown, of the same county and State, the receipt whereof I do hereby acknowledge, have remised, released, and forever quit claim and by these presents do remise, release, and forever quit claim unto the said John Henry Brown, his heirs and assigns, the one undivided half of a certain tract of land lying and being in Calhoun county aforesaid, upon the southwest bank of the Matagorda bay, more particularly described as follows, to wit, commencing on said Matagorda bay at the southeast corner of D. N. White's survey, eleven hundred varas above Powderhorn bayou; thence down the margin or meanders of said bay to the mouth of said Powderhorn bayou; thence up said bayou and back, for quantity containing or to contain three hundred and seventy acres, being the same land entered and located by me, the said William M. Cook, on the 12th day of September, 1849, by virtue of James A. Wells' certificate of bounty land, No. 5072, which entry and location is No. 429 in the Victoria land district. To have and to hold the aforesaid premises, with all the privileges and appurtenances to the said tract of land in any wise belonging or appertaining, unto the said John Henry Brown, his heirs and assigns, to his or their use forever, so that neither I, the said William M. Cook, nor my heirs, nor any person or persons claiming under me or them,

shall at any time hereafter, by any way or means, have claim or command any right or title to the aforesaid premises or appurtenances, or to any part or parcel thereof.

In testimony whereof, I, the said William M. Cook, have hereunto set my hand and affixed my scrawl, by way of seal, this first day of March, A.D. 1850.

WILLIAM M. COOK. [L. S.]

To which ruling and judgment of the court defendant by his counsel excepted.

Bill of Exceptions, continued.

Plaintiffs then read in evidence deed from William M. Cook, defendant, to sundry persons, as follows:

Deed from William M. Cook to sundry persons.

Wm. M. Cook, Deed, sundry persons.

State of Texas, County of Calhoun.

Know all men by these presents, that I, William M. Cook, of Calhoun county and State of Texas, for and in consideration of the sum of one hundred dollars, the receipt of which I hereby acknowledge, have relinquished and confirmed, and, by these presents, do relinquish and confirm, unto the several persons hereinafter named, all of my right, title, interest, claim, and demand of, in, and to the following named town lots, as respectively named below, to each separate individual as appears below, his heirs and assigns, forever. Said town lots being described and numbered, as shown upon the plat and plan of Brown's addition to Indianola, as surveyed and drawn by Daniel Lewis, Esq., to wit: Lots one and two, in block one, unto John Henry Brown and James D. Cochran. Lots three, four, nine and ten, in block one; also lots seven and eight in block two, to J. L. Coburn. Lots eleven and twelve, in block one, to Solomon G. Cunningham. Lot eight, in block one, to J. C. Bullock. Lot one, in block two, to John F. Segui and Charles Mason. Lots three and nine, block ten, to Chambers Etter. Lot five, block two, Charles A. Ogsbury. Lot two, in block two; also lot one, in block twenty-one, to John A. Mitchel, of New Orleans. Lot two, in block three, to Dr. John D. Brown. Lot one, in fractional block B., to Dr. Jno. H. Baldwin. Lots three and four, in fractional block B., to Henry B. Mitchel. Lot four, in block twenty-two, to John McDonald. Lot nine, block five, to David Lewis. Lots four and ten, in block six, to William J. Ward. Lots one and seven, block five, to Charles Mason. Lot two, block twenty-one; also lot one, block twenty-two, to Mrs. Mary M. Brown. Lots one and seven, block four; lots and five, block twenty-three, to Peter McDermot.

To have and to hold the same unto the above-named grantees, their heirs and assigns, forever, I, the said William M. Cook, hereby relinquishing, alienating, and confirming unto them all the right, title, interest, or claim that I have in or to the same, by virtue of a location made on the land, including said lots, in September, A.D. 1849, in the surveyor's office in the Victoria land district, by virtue of a bounty land claim issued to James A. Wells, and duly transferred to me, hereby covenanting to defend the said grants above, unto the persons or grantees respectively named, against any or all persons who claim or may claim the same, by, through, or under me.

In testimony of all which, I do hereunto subscribe my name, with a scroll for a seal, on this the 15th day of April, A.D. 1850, the words in the 9th line, first page, and bargain and sell, in the 11th line, same page, interlined before signing.

WM. M. COOK, [L. S.]

Witness:
JAMES ASHWORTH,
C. B. MAYNARD.

State of Texas, County of Calhoun.

I, John C. Cleland, a notary public in and for the county and State aforesaid, duly commissioned and sworn, do certify, that William M. Cook, whose name is subscribed to the foregoing instrument of writing, personally appeared before me, and acknowledged that he did sign and seal the same, for the purposes and considerations therein expressed.

In testimony whereof, I, the said notary, have hereunto set my hand and affixed my seal of office, at Indianola county and [L. S.] State aforesaid, this 25th day of April, in the year of our Lord, 1850.

JOHN C. CLELAND,
Notary Public.

Filed for record the 28th day of May, A.D. 1850, at 2 o'clock P. M. Recorded 15th day of June, A.D. 1850.

WILLIAM P. MILBY,
Clerk.

The State of Texas, County of Calhoun.

This is to certify, that the foregoing is a true and correct copy of a deed, entitled William M. Cook deed, sundry persons, from book of Records B., in my office, page 70.

As witness my hand and the seal of the County Court of Calhoun [L. S.] county, this first day of June, A.D. 1859.

JOHN B. BURKE,
Clerk County Court, Calhoun County.

Bill of Exceptions, continued.

Plaintiff then read lease to John Swartz, having proved that the witness thereto, Binderwald, was dead; and that the witness, Creaner, resides, and is in California, and also proved his signature. Said lease is as follows:

The Lease referred to.

State of Texas, County of Calhoun.

This indenture, made this 26th day of September, 1846, between Levi Jones of the one part, and John Swartz of the other part, witnesseth, that for and in consideration of the sum of five dollars, good and lawful money, in advance paid by the said Swartz, the receipt whereof is hereby acknowledged by the said Jones, he, the said Jones, hath bargained, hired, leased, and to farm let, to him, the said Swartz, to his use and behoof, for the term of five years from the date hereof, all that tract of land in the county aforesaid, extending from near Indian point, on the bay of Matagorda, to Green lake, near the Gaudaloupe river, embracing sixteen sitios or leagues of land, granted by the State of Coahuila and Texas, to Benito Morales, Juan Cano, S. Gonzales, F. Alvarado, C. Garcia, P. Garcia, C. Costello, B. Mildonado, V. Hedaldo, M. Campos, E. Fuentes, M. Costello, E. P. Miranda, M. Cortez, E. Randon, and M. Lopez, the same tract on which the said Swartz now resides, and which will be found more particularly described in the several original grants to B. Morales and others, which are filed in the land-office at Austin. To have and to hold the same to him, his heirs, and assigns, for the aforesaid term of five years; it being covenanted and agreed, however, that if the said Jones shall, during the term aforesaid, sell, or require the whole or any part of said tract of land, for laying out a town thereon, or for any other purpose, he shall be entitled to receive the same, upon giving notice to the said Swartz, and this lease shall cease to have effect as to such part or portion; and further, that possession of the whole of said land be delivered by the said Swartz to the said Jones, at the expiration of the term aforesaid, without more delay. The said Swartz being present, and accepting the conditions expressed herein, has hereunto signed, together with the said Jones.

Written in duplicate, and signed, sealed, and delivered, in the presence of the subscribing witnesses.

LEVI JONES, [L. S.]
JOHN SWARTZ. [L. S.]

Subscribing witnesses:
R. BINDERWALD,
CHS. N. CREANER.

Bill of Exceptions, continued.

It was agreed by counsel, that Saluria was six or eight miles from Powderhorn.

Bill of Exceptions, continued.

Plaintiffs introduced Captain Cady, deputy marshal, who testified that he went over the bay to Virginia point, since the commencement of the court, to summon Charles Hoffman as a witness. Had a subpœna, and summoned him. Dr. Levi Jones was along; he is the agent of plaintiffs. Dr. Jones asked Hoffman for that paper, and Hoffman went and got it; handed it to the Doctor, who requested witness to put a mark on it, so as to know it; witness did so, and now identifies the paper. Hoffman came over, and was in court, and left. Dr. Jones had another subpœna issued; and handed witness five dollars to tender to Hoffman, to compel his attendance. Witness sent the subpœna to Judge William J. Jones (who is a deputy marshal) for service on Hoffman, and sent him the five dollars to be tendered to Hoffman. Plaintiffs then read the subpœna to Hoffman served by Jones, and return thereof, as follows:

The Subpœna referred to.

The President of the United States, to the Marshal of the Eastern District of Texas, greeting:

You are hereby commanded to summon Charles Hoffman, to be and appear forthwith, before the United States District Court for the Eastern District of Texas, at the United States court-house in Galveston, to testify and the truth to speak in behalf of Burnley & Porter, in a certain cause pending in said court, wherein said Burnley & Porter are plaintiffs, and William M. Cook and others are defendants. Herein fail not; and make due return how you have executed this writ.

Witness Hon. John C. Watrous, judge of said court, with seal of court, on the 15th January, A.D. 1859.

JAMES LOVE,
Clerk.

On which said subpœna, the marshal afterwards made return in words and figures as follows:

Received June 15th, 1859, and served on the morning of the 17th, and handed the witness five dollars, to bear his expenses.

H. E. McCULLOCH,
By deputy WM. J. JONES.

Bill of Exceptions, continued.

Plaintiffs then read to the jury the paper referred to by the witnesses, Hoffman and Cady, for the purpose of showing the weight to be given to Hoffman, admitted to be in the handwriting of Deputy Cook.

The paper referred to by witnesses, Hoffman and Cady.

This paper is not among the files of the court, and is supposed to be lost.

JAMES LOVE,
Clerk.

Bill of Exceptions, continued.

Plaintiffs, for the same purpose, then read to the jury the deposition of the witness Hoffman, taken before F. J. Cook, notary public, with the caption and certificate thereto, as follows:

Deposition of Charles C. Hoffman.

United States of America, District Court of the United States for the Eastern District of Texas.

Eastern District of Texas, *ss.* In the City of Galveston.

ALBERT T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK and others.

On the 15th day of January, A.D. 1859, William M. Cook personally appeared before me, F. G. Cooke, a notary public in and for the county of Austin, State of Texas, duly commissioned, bonded, and sworn, who being by me duly sworn, deposes and says, that he is one of the defendants in the above-entitled cause; that said cause is pending in said court. That Charles C. Hoffman, of the town of Hempstead, in the county of Austin, State of Texas, is a material witness for said defendants in said cause, whose testimony is necessary in the same, on the trial thereof, as deponent is advised and believes. And further, that said witness being a transient person, but now at Hempstead, in the said county of Austin, and State of Texas, at a greater distance than one hundred miles from the place of trial of said cause, the same being in the city of Galveston, in the county of Galveston, and said State of Texas. And deponent further says, that he has been informed and believes the said Royal A. Porter and Albert Burnley, the said plaintiffs, reside in the city of New Orleans, about four hundred miles from the place where the examination of the said witness is expected to take place; and also, as he

is informed and believes, William P. Ballinger, Esq., the attorney for the plaintiffs, resides at the city of Galveston, in the county of Galveston, and State of Texas, at a greater distance than one hundred miles from the place where the said examination is expected to take place.

WILLIAM M. COOK.

Subscribed and sworn to this 15th day of January, A.D. 1859.

F. J. COOKE,
Notary Public, Austin County, Texas.

United States of America, District Court of the United States for the Eastern District of Texas.

Eastern District of Texas, *ss.* In the City of Galveston.

ALBERT T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK and others.

Let the witness named in the annexed affidavit be examined *de bene esse*, before me accordingly, at Hempstead, in the county of Austin, and State of Texas, on the 15th day of January, A.D. 1859, at ten o'clock, forenoon. Dated this 15th day of January, A.D. 1859.

F. J. COOKE,
Notary Public, Austin County, Texas.

United States of America, District Court of the United States for the Eastern District of Texas.

Eastern District of Texas, *ss.* In the City of Galveston.

ALBERT T. BURNLEY and ROYAL A. PORTER
v.
WILLIAM M. COOK et als.

Be it remembered, that by virtue of the Acts of Congress, entitled "An act for the more convenient taking affidavits and bail, in civil causes depending in the courts of the United States," passed March 1st, 1817. And an act entitled, An Act to establish the Judicial Courts of the United States, passed September 24th, 1789. And an act, passed 29th July, 1854, authorizing and empowering notaries public to take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect, as commissioners to take acknowledgments of bail and affidavits may now lawfully take or do, I, J. F. Cooke, a notary public in and for the county of Austin, State of Texas, duly commissioned, bonded, and sworn, residing near Hempstead, in the said county of Austin, in the said Eastern District of

Texas, after having by order previously appointed the day for the examination, in accordance with said order, have this day caused to come before me, Charles C. Hoffman, a witness in the above entitled cause, to be examined, on the application of defendants in said cause, now pending in the United States Court in and for the Eastern District of Texas. And I further certify that said witness, Charles C. Hoffman, is a person of sound mind and lawful age, and that after being by me first carefully examined and cautioned, and sworn to testify the whole truth and nothing but the truth, he did depose and say, that he is fifty years of age; that he lives at present at Hempstead, in the county of Austin and State of Texas, and that his trade or occupation is that of a ship-carpenter; that himself stating: I am a transient person, but temporarily living at Hempstead, Austin county, Texas. I know William M. Cook, one of the defendants, and have known him since 1838. I sold him my headright, a third league of land. I have known him in Texas ever since. I don't know Albert Burnley and Royal Porter. I never knew them as citizens of the Republic or State of Texas. I have known Powderhorn bayou in Texas. I was in the employment of Texas on the Liberty, a privateer in the service of Texas, under Capt. Brown. When we met in Matagorda bay, in 1836, I was in the bayou known by the above name of Powderhorn. I have known it ever since it was navigable for vessels, drawing four feet water over the bar, at its mouth. Inside there is ten feet water, and two hundred feet wide, up to its bay. It has undergone no change since I first entered it, except from the demand for schooners and steamers passing it has increased its depth at its mouth.

The land on both sides the bayou is prairie, from its mouth to its bay, about three quarters of a mile, by the meanders of the bayou. The upper or north side of the bayou is mixed with shell. On the front on Matagorda bay, and back to the common prairie soil, and runs back to a bayou known as Bullock's or Moore's bayou, that is some fifty feet wide. The bay of Powderhorn is navigable, being from three and a half to four feet deep, and about eight or nine miles in length, from the bayou to its head, and will average three miles in width. I lived on the land at Powderhorn, near its mouth. I went there and settled under an agreement or lease, from William M. Cook, in the year 1847 (it was in February), on the labor of land on the north side of Powderhorn, or what was known as the A. M. Gwatney labor, or tract of land. I occupied the same, improved and cultivated it, as the tenant of Cook. Had charge of his posts and wharf, lumber, and property there. I built a dwelling one story high, extended the improvement, cultivated the garden fields, sank two wells, and continued to cultivate and improve as the tenant of William M. Cook. Neal Carline joined me some time in the summer or fall of 1848, on or about the first of January, 1849. I got a job at Indianola, and left Carline on the Powderhorn place,

with the understanding that he was to take charge for me until I returned. I made an arrangement with Cook to establish a shipyard, in connection with the improvements in which Carline was interested. He (Carline) made other improvements, to what extent I am not quite certain. He continued to cultivate and occupy the place as Cook's tenant till some time in 1851, about the 20th of August, when the possession was given up to Cook, who has since resided, and still resides on the place, cultivating and improving the same. I went on the land at Powderhorn first as the property of Wm. M. Cook, with the distinct understanding that the same was to be surrendered to me, or any one holding or occupying it under me. This was accordingly done by Carline, who was concerned with me, and continued to hold the improvements until they were surrendered to said Cook, who has continued to occupy and improve the same, and who now resides on the premises. I never heard of any other owner to the land but Cook, before going on it. It was never claimed by any body but him, while we occupied it, neither as owner, agent, or tenant of any other person. I don't recollect any more at present that will benefit the parties, except it was understood that the land I occupied for Cook was designated for a town site, and it is now the county seat of Calhoun county. I understood the land joined S. A. White, and Cook and White were considered in the town.

CHARLES C. HOFFMAN.

And I, the said notary public as aforesaid, do further certify, that the causes and reasons alleged and appearing by affidavit before me, for taking said depositions were, that the testimony of said witness was material and necessary on the trial of said cause, and that said witness was a transient person, now living at Hempstead, Austin county, more than one hundred miles from Galveston, in the State of Texas, the place of holding the court for the trial of said cause; and I also certify that no notice was given or served on the plaintiff or his attorney, for the reason, that neither the said plaintiff nor his attorney resided within one hundred miles of said place of taking said deposition. And I further certify that the said deposition was reduced to writing by me; that after being so reduced to writing it was carefully read over to said witness, after which he subscribed the same as his sworn testimony, to be used in the said cause, and on the trial thereof. And I further certify, that I am not of counsel or attorney for either of the parties to the said suit, nor in any way interested in the event of said suit. And further, that I have received said deposition in my possession, for the purpose of sealing and directing the same with my own hand, and forwarding it to the court where said cause is pending for trial.

F. I. COOKE,
Notary Public, Austin Co., Texas.

The State of Texas, County of Austin.

I, W. S. Day, chief justice of said county, do certify, that F. I. Cooke, before whom the foregoing deposition is taken, is a regularly commissioned notary public, bonded and sworn in and for the said county of Austin, and that his official acts are entitled to full faith and credit.

In testimony whereof I hereunto set my hand on this the 18th day of January, A.D. 1859.

[L. S.]

W. S. DAY,
Chief Justice Austin Co.

Bill of Exceptions, continued.

The plaintiffs closed their testimony.

The defendant Cook then offered in evidence an agreement made between Levi Jones, John Henry Brown and others, the same being on file in the chancery suit of Burnley *v.* Brown and others, and on which the final decree therein perpetuating the injunction was rendered, and the same was read as evidence to the jury, without objection, as follows:

Agreement between Levi Jones, John Henry Brown, &c., referred to above.

Memorandum of an agreement made and entered into this 19th day of July, 1850, between Levi Jones, agent and attorney in fact for A. T. Burnley of the one part, and John Henry Brown, C. Etter, James D. Cochrane, C. A. Ogsbury, John F. Segui, C. Mason, D. H. McDonald, and William Hawley, witnesseth, that whereas there are two suits, one in trespass and the other an injunction case, now pending in the Federal Court of the State of Texas, in which the said Burnley is plaintiff, and the other parties hereto are defendants, and which said suits both the parties hereto have agreed to settle and adjust without any further proceedings in said court, as follows, viz.: the suit in trespass to be dismissed by the plaintiff at the cost of the said defendants, and the injunction to be made perpetual also at the cost of the defendants; and the parties hereto bind themselves to instruct their respective counsel as early as practicable to have the said cases disposed of in manner as above set forth, so as to avoid the further accumulation of costs. In witness whereof the parties

aforesaid have hereto set their hands and seals, in duplicate. At Indianola, the day and year first above written.

LEVI JONES, [L. S.]
JOHN HENRY BROWN,
For himself, and agent of Jas. Cochran.

In presence of
C. ETTER,
CHARLES MASON,
JOHN F. SEGUI,
CHAS. A. OGSBURY,
D. MCDONALD.

Bill of Exceptions, continued.

Letter from John Henry Brown to Levi Jones, referred to above.

(Confidential.)

INDIANOLA, February 6th, 1850.

DR. LEVI JONES.

MY DEAR SIR: My relations to you demand that I should drop you a few lines relative to term making hereabouts. Time forbids my going into details, indeed, there are none to go into, but I trust you will allow me confidentially to communicate all that seems to be of interest here, touching your own and our interests. I prefer speaking privately, and know you do likewise.

Since your return from New Orleans, the friends of La Salle have become disheartened, and think there is no chance now of building it up. They feel restless for something to be done, lest the island, or Decrow's or Palacios might arrest public attention. They believe that the means now exist in Indianola, to set the ball in successful motion, by commencing at Powderhorn bayou. This is my own opinion. The Palmetto is now lying directly in front of the bayou, in nine feet water, less than an average tide, and very close to shore. The occasion of Lavaca starting opposition steamers into this bay, is believed to be a favorable time to strike. Only one thing is wanted; the title. This it is in your power to grant, with the one-fourth mortgaged, as I have understood from you. This embarrassment on the one-fourth interest will deter none of us from taking hold. The advantages of the bayou are esteemed of late of incalculable, and especially in connection with the first improvements proposed. My object is, my esteemed sir, to suggest to plead with you to yield something on this point, or allow La Salle to start at the bayou. I can now say to you that D. H. McDonald, Segui, and Mason, Ogsbury, and Etter, and Brown, and Cochrane, and no doubt others, will at once unite in building a wharf of some practicable kind there, and of course their warehousing business must immediately follow. If you will do this now while the spirit is up, you will see a little city

there in one year. Let this be done, and we can get the San Antonio business. I do not think it should be a matter of delicacy with you, about the mortgage on your part of the land, because every one would buy, knowing the lien to exist. Cannot La Salle be brought into notice better thus than in any way now likely to succeed. I do assure you that you can realize money from the sales of ground there that would astonish us. I know your objections to this course. I respect them; have thought much on them, and looked at both sides of the question. But I do verily believe, a little action will do more good than a great deal of theory, however well founded. My reason for writing a confidential note, is to say that so great is the interest felt here on this subject, by the persons named and others, that rather than fail they would procure Mr. White's claim to the ground, and do the best they could with it.

You will appreciate my motives I hope for speaking with candor to you on this point. I do so with delicacy, but I believe such will be the case, even with men who consider your title the best. It is in your power to come down and throw the door open to us all. If the ground was laid out with front streets on the bayou, and the bayou, a beautiful place could be formed.

Truly,

JOHN HENRY BROWN.

Bill of Exceptions, continued.

The defendant then offered as a witness, Bravo, who testified that he was a Spaniard; that the word "barranca" meant the top of the bank of a river, lake, &c. It does not mean the edge of the water, but the top of the bank. It also means a cane brake.

Here the evidence of plaintiffs and defendants closed.

Be it further remembered, that the counsel for the defendants prayed the court to give the following several instructions to the jury.

First. If Mauro was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which plaintiff can recover.

Second. If the plaintiffs' title was not on record in the county where the land lies, or in the general land office, at the time defendant located his land warrant, and completed his survey and obtained his patent, he is in the position of an innocent purchaser, and entitled to recover.

Fourth. If the plaintiffs' title includes an island surrounded by tide water, it is bad as to the island.

Fifth. If the jury from the evidence, can fairly and justly construe both the plaintiffs' and defendants' title so that both can stand, it is their duty to do so; which said several instructions were refused by

the court; and to the said refusal and ruling of the court, the said defendant excepted.

Be it further remembered, that on the said trial, the following instructions to the jury, prayed by the counsel for plaintiffs, was granted, and given by the court to the jury.

The diagram or plot attached to plaintiffs' grant is evidence to show the designation and character of the land granted, and may be used by the jury for its shape and boundaries. It appears to have been surveyed by magnetic courses, and if the survey returned by Beaumont was not surveyed by the magnetic, but the true course, the jury must make allowance for the difference, and Beaumont's cannot be regarded as showing the original survey. The fourth call is from the end of the third line, with the bend of the "Laguna Madre" of Matagorda, to the beginning.

To the giving which said instructions to the jury by the court, the said defendants, by his counsel, excepted.

Now, in order that all the said exceptions to the said rulings of the court on the trial of this cause, may appear of record, for revision by the Supreme Court of the United States, the said defendants' counsel submits the foregoing as his bill of exceptions before the jury retired from the bar; and prays that the same be allowed, signed, sealed, and enrolled, and made a part of the record. Which was done accordingly.

JOHN C. WATROUS. [L. S.]

And afterwards, to wit, on the second day of July of the same year, a motion for a new trial was filed herein, which is as follows, to wit:

Motion for a New Trial.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als.

In the District Court of the United States, for the Eastern District of Texas, holding its session at Galveston.

And now comes the said defendants in said cause, by his attorneys, and moves the court for a new trial in the same, for the reasons:

1st. The court erred in overruling the application of the defendants for a continuance, and motion for change of venue.

2d. The court erred in sustaining the motion of plaintiffs to strike out the plea in abatement, in plea to the jurisdiction filed by the defendants.

3d. The court erred in not entertaining the motion, plea, and evidence as to the jurisdiction of this court, on account, as urged by defendant and shown by the proof, of the pendency of the same cause of action, and same defence, between the same plaintiffs and defen-

dants, and their privies, in the District Court of the State of Texas, of Harris county, which latter court had jurisdiction of said cause, long previous to said United States District Court attempting to take jurisdiction of the same, which said cause is still pending, and undecided, in the said county of Harris, as is shown by the proof herein, which fact has been brought to the knowledge of this court by plea and proof.

4th. The court gave no charge to the jury in writing, but charged the jury orally, and argued to them the merits of the case, and how they should find their verdict.

5th. The court erred in refusing to give the charges to the jury as requested by defendants' attorney.

6th. The court erred in giving the charges given at the instance of plaintiffs' attorney.

7th. Several of the jurors lacked the qualifications of jurors as required by the law, which fact defendant has ascertained only since the trial of said cause.

8th. The verdict was contrary to law.

9th. The verdict was contrary to the evidence.

10th. Defendant moves in arrest of judgment, for the reasons set forth in the foregoing motion for new trial.

DOOLEY & POTTER,
For Defendant.

And afterwards, to wit, on the twenty-fifth day of the same year, a motion for a new trial was filed herein, which is in the words and figures following, to wit:

Motion for New Trial.

BURNLEY & PORTER
v.
WILLIAM M. COOK.

In the District Court of the United States, for the Eastern District of Texas, No. 441.

And now comes the defendant, William M. Cook, and suggests and makes known to the court, as a further ground for a new trial in said cause, that Benj. McCulloch was not United States marshal of said district when the venire for the persons who tried said cause was served on said jurors, and returned into said court, and that J. A. H. Cleveland, who purports and who undertook to act as deputy marshal for said McCulloch in summoning said jurors and returning said venire, was not in fact such deputy of said McCulloch, at the time he undertook thus to act, and that the acts of the said Cleveland in the premises are null and void. All of which the defendant brings to the notice of the court, and refers to the records of the

county for proof of the fact, and asks leave of the court to introduce evidence as to the same.

DOOLEY,
For Defendant.

And afterwards, to wit, on the twenty-sixth day of July, of the same year, a subpœna was issued herein, which is in the words and figures following, to wit:

Subpœna for Patrick M. Carey.

The President of the United States of America, to the Marshal of the Eastern District of Texas, greeting: You are hereby commanded to summon Patrick M. Carey to be and appear before the judge of the District Court for the Eastern District of Texas, now in session in the court-house thereof, forthwith, to testify and the truth to speak on behalf of William M. Cook et als., in a cause pending in said court between Burnley and Porter, plaintiffs, and William M. Cook et als., defendants. Herein fail not; and make due return how you have executed this writ.

Witness Hon. J. C. Watrous, judge of said court, on the 26th of July, A. D. 1859.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal in the words and figures following, to wit:

Marshal's Return.

Received, July 26th, 1859, and executed on 27th day of same month, by reading this subpœna to Patrick M. Carey, in person, in Galveston.

H. E. McCULLOCH,
U. S. Marshal.

And afterwards, to wit, on the twenty-seventh day of July of the same year, a subpœna was issued herein, which is in the words and of the tenor following, to wit:

Subpœna for Thomas Snipes.

United States of America, Eastern District of Texas.

The President of the United States of America to the marshal of the Eastern District of Texas, greeting: You are hereby commanded to summon Thomas Snipes to be and appear before the judge of the United States for the Eastern District of Texas, now in session at the court-house, forthwith, to testify and the truth to speak in be-

half of William M. Cook et al., in a cause pending in said court between Burnley and Porter, plaintiffs, and William M. Cook, defendant. Herein fail not, and due return make how you have executed this writ.

Witness the Hon. John C. Watrous, judge of said court, on the 27th day of July, A.D. 1859.

[L. S.]

JAMES LOVE,
Clerk.

And afterwards, to wit, on the same day and year, an application was filed herein for a new trial, which is in the words and figures following; that is to say:

Application for New Trial.

In the District Court of the United States for the Eastern District of Texas. No. 441.

BURNLEY and PORTER
v.
WILLIAM M. COOK et als.

And now this day, July, 1859, comes the said defendant, William M. Cook, who has already filed a motion for a new trial in the said cause, for various reasons heretofore by him assigned, and, as an additional reason for a new trial in said cause, he brings to the notice of the court and alleges and charges that he is informed and believes that P. M. Carey, who was a juror and joined in the verdict in said cause, is an alien, and was not, at the time of the rendition of said verdict, a citizen of the State of Texas, nor a qualified juror in any county in the said State of Texas within the said judicial district; and defendant further says, that the said facts of the alienage, and the said disqualifications of the said P. M. Carey came to the knowledge of the said defendant for the first time last evening, July the 25th, 1859, after the adjournment of the said court. Defendant asks leave of the court to substantiate the facts in this statement, made by competent proof; he also charges that he has been informed and believes, and he got the information from Thomas Snipes, one of the jurors who returned a verdict in said cause, that he, said Snipes, is not and was not, when he was summoned as a juror and rendered his verdict in said cause, a freeholder in said State, nor a householder in any county in the same, and is not and was not a qualified juror in any county in said judicial district, of which fact defendant knew nothing until after said verdict was rendered.

WM. M. COOK.

Signed and acknowledged and sworn to before me, 27th July, 1859.

JAMES LOVE,
Clerk.

United States of America, State of Texas.

Before the undersigned authority personally appeared William M. Cook, defendant in said cause, and upon oath said, that the allegations in the foregoing statement and motion as made, upon his own knowledge are true, and those therein stated upon the information of others he believes to be true.

WM. M. COOK.

Sworn to and subscribed before me, at Galveston, this 27th July, 1859.

Witness my hand and notarial seal of office, in Galveston, the 27th July, 1859.

E. T. AUSTIN,
Notary Public, Galveston, Texas.

And afterwards, to wit, on the second day of August of the same year came the parties, and filed herein their sixth bill of exceptions, in words and figures as follows, to wit:

Sixth Bill of Exceptions.

A. T. BURNLEY & R. A. PORTER
v.
WILLIAM M. COOK et als.

On the hearing of the motion for a new trial, and in arrest of judgment in the above cause to support the same, the defendant, William M. Cook, filed and read to the court his affidavit, as follows:

In the District Court of the United States for the Eastern District of Texas.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

And now on this day of July, 1859, comes the said defendant, William M. Cook, who has already filed a motion for a new trial in the said cause, for the various reasons heretofore by him assigned, and, as an additional reason for a new trial in said cause, he brings to the notice of the court, and alleges and charges he is informed and believes that P. M. Carey, who was a juror, and joined in the verdict of said cause, is an alien, and was not at the time of the rendition of said verdict a citizen of the United States, nor a qualified juror in any county in the said State of Texas within the said judicial district. And defendant further says that said facts as to the alienage, and the said disqualification of the said P. M. Carey, came to the knowledge of the said defendant for the first time last evening, July the 25th, 1859,

after the adjournment of the said court. The defendant asks leave of the court to substantiate the facts in this statement made by competent proof. He also charges that he has been informed and believes, and he got the information from Thomas Snipes, one of the jurors who returned a verdict in said cause, that he, said Snipes, is not, and was not when he was summoned as a juror and rendered his verdict in said cause, a freeholder in said State, nor a householder in any county of the same; and is not and was not a qualified juror in any county in said judicial district; of which fact the defendant knew nothing till after the verdict was rendered.

WILLIAM M. COOK.

Signed and acknowledged, and sworn to before me, 27th July, 1859.

JAMES LOVE,
Clerk.

On the hearing of the motion for a new trial, and in arrest of judgment in the above cause to support the same, the defendant, William M. Cook, filed and read to the court his affidavit, as follows:

Affidavit.

United States of America, State of Texas.

Before the undersigned authority, personally appeared William M. Cook, defendant in said cause, and upon oath said, that the allegations in the foregoing statement and motion, as made upon his own knowledge, are true; and those therein stated on the information of others, he believes to be true.

WILLIAM M. COOK.

Sworn to and subscribed before me, at Galveston, this 27th July, 1859.

Witness my hand, notarial seal of office, in Galveston, the 27th July, 1859.

E. P. AUSTIN,
Notary Public, Galveston, Texas.

Bill of Exceptions, continued.

Also the certificate from the assessor of Galveston county, as follows:

[This paper not on file, and missing from the record.]

JAMES LOVE,
Clerk.

Bill of Exceptions, continued.

Said defendants then read the *venire facias* to the present term of court, as follows:

Venire Facias referred to.

The United States of America, Eastern District of Texas, *ss.*

The President of the United States of America to the Marshal of the Eastern District of Texas, or any of his lawful deputies, greeting:

We command you that you summon thirty-six good and lawful men of your district, to be and appear at the court-house of the District Court of the United States, for the Eastern District of Texas, to serve as jurors at a court to be holden at the city of Galveston, in and for said district, on the first Monday of the month of May, in the year of our Lord one thousand eight hundred and fifty-nine.

Witness the Hon. John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this 23d day [L. S.] of March, A. D. 1859, and the 83d year of the Independence of the United States of America.

JAMES LOVE,
Clerk.

Upon which said venire facias the marshal made return in words and figures as follows:

"Received, March 23d, 1859, and executed by summoning the following named persons, good and lawful jurors, of the Eastern District of Texas, by reading this writ to each one of them and commanding them to be and appear as herein directed, namely:

1. Nich. S. Hill,
2. H. W. Bentick,
3. R. D. Johnston,
4. L. J. Kirkpatrick,
5. Whitfield Davidson,
6. Jasper Terheun,
7. Henry Sorrell,
8. P. M. Carey,
9. Luke Bryan,
10. Samuel Pair,
11. Wm. M. Philips,
12. A. M. Hughes,
13. John W. Burke,
14. David H. Grove,
15. Alex. Kerr,
16. John Dillard,
17. James R. Mitchell,
18. H. H. Hough,
19. Geo. Westley Herd,
20. John J. Dunn,
21. J. R. Burch,
22. Stephen Richardson,
23. George Stevens,
24. William Ferguson,
25. Andrew Kaufner,
26. Geo. C. Gefhard,
27. Chas. C. Frankland,
28. A. M. Miller,
29. James P. Nash,
30. John Howard,
31. Thomas Snipes,
32. John L. Slught,
33. R. K. Crozier,
34. William Sanderson,
35. D. D. Cady,
36. L. W. Stoy.

All of whom are good and lawful men of my district.

BENJAMIN McCULLOCH,
U. S. Marshal.
By J. A. H. CLEVELAND,
Deputy.

Bill of Exceptions, continued.

Defendant also read the following entry on the record of the present term of this court, as follows:

Entry on Record of Venire Facias, on Monday, May 9th, 1859, as returned by Marshal.

"The marshal, in pursuance of a writ of venire facias, issued on the 23d day of March, A. D. 1859, commanding him to summon thirty-six good and lawful jurors, to serve as jurors during the May term, 1859, made the following return on said writ: Received, March 23d, 1859, and executed by summoning the following named persons, good and lawful men of the Eastern District of Texas, by reading this writ to each one of them, to be and appear as herein directed, namely:

N. S. Hill,	Geo. Westley Herd,
H. W. Bentick,	John J. Dunn,
R. D. Johnson,	J. R. Burch,
L. J. Kirkpatrick,	Stephen Richardson,
Whitfield Davidson,	George Stevens,
Jasper Terheun,	William Ferguson,
Henry Sorrell,	Andrew Kaufman,
P. M. Carey,	George Gefhard,
Luke Bryan,	Charles C. Frankland,
Samuel Pair,	A. M. Miller,
William M. Philips,	James P. Nash,
A. M. Hughes,	John Howard,
John C. Burke,	Thomas Snipes,
David H. Grove,	John L. Slught,
Alexander Kerr,	R. B. Crozier,
John Dillard,	William Sanderson,
James R. Mitchell,	D. C. Cady,
H. H. Hough,	L. W. Stoy.

All of whom are good and lawful men of my district.

BEN. McCULLOCH,
U. S. Marshal.
By J. A. H. CLEVELAND,
Deputy.

Bill of Exceptions, continued.

Defendants then examined James Love, the clerk of the United States District Court, who testified that he did not know at what time Ben. McCulloch resigned his office as United States marshal. Cleveland had shown him a letter from Major McCulloch, speaking of his resignation, but witness does not remember the date of the letter, or when he said he resigned. Saw the letter before this court commenced. The venire facias was returned to the clerk's office the first day of the term of the present court, first Monday in May. The judge did not arrive until the 9th day of May, and the court was adjourned from day to day under the written order of the judge. When the judge arrived and opened court, on the 9th of May, the venire facias was entered. There being no proceedings of court, except the daily adjournments, prior to the judge's arrival, witness, as clerk, did not enter the venire on the record, considering he had no right to do so. Mr. Cleveland continued to act as deputy marshal, until the qualification of Henry McCulloch, on the 7th day of May.

Bill of Exceptions, continued.

Defendant introduced as a witness Patrick H. Carey, who testified, that he was one of the jurors who sat on the case of Burnley & Porter *v.* Cook and others, at the present term of court. Am a citizen of the United States; was naturalized, and received *and received* his certificate from the Circuit Court of Warren county, Mississippi, in the year 1844. It was his final certificate, and not a declaration of intention; made that in New York. Has lived in the United States since 1836. His papers are in due form. Was deputy clerk of the court at Vicksburgh, in which he was naturalized. The papers were at his house, and could go and get them if desired. Never told any one he was not a citizen of the United States.

Bill of Exceptions, continued.

Defendant introduced J. A. H. Cleaveland, who testified that he was the deputy marshal for Ben. McCulloch, United States marshal, from the time he became marshal. From the time he became marshal had been in charge of the office at Galveston.

Ben. McCulloch wrote him that he resigned, to take effect the 1st of April, supposing that his successor would be qualified by that time, but that he must continue to act until his successor qualified. Witness had continued to act as deputy marshal, discharging all the duties of the office, up to the 7th day of May, the day his successor, Henry McCulloch, qualified. His acts as such had been recognized. The accounting officers of the treasury at Washington allowed and paid Ben. McCulloch's accounts as marshal to the 7th day of May,

including six days' attendance at the present term of court. The service was returned to the clerk the first day of court, first Monday in May. Has never been deputy of Henry McCulloch, the present marshal.

Bill of Exceptions, continued.

Defendant introduced Henry McCulloch, who testified that he is the United States marshal for this district. Exhibited his commission from the President, to take effect on the 1st day of April, 1859. Witness qualified as marshal on the 7th day of May, and did not commence acting as such until that day.

Bill of Exceptions, continued.

The defendant Cook then introduced as a witness Thomas Snipes, who testified that he was one of the jurors in said case. Owns lands in Texas,—town-lots. Owns one town-lot in Corpus Christi; bought it from J. Benton Johnson, in 1853; have owned it ever since. Paid taxes on it, except last year. Have lived in Galveston ten months. Hasn't his title-papers with him; they are in Corpus Christi.

Cross-examined.

Never told Colonel Cook, or any one else, that witness was not a freeholder. Soon after the trial of this case, Colonel Cook inquired of witness whether he owned any land. Witness told him he did, and told him the facts. Colonel Cook has tried repeatedly since to get witness to give an affidavit that he was not a freeholder or householder. Witness refused to do so; told Colonel Cook he would not ruin his character for him or any other man. Colonel Cook said witness should not lose anything if he would swear to that.

And the said motion for a new trial, and in arrest of judgment, having been considered by the court, the same is overruled, which ruling of the court the said defendant, Cook, by his counsel excepted, and prays that this, his bill of exceptions, be signed, sealed, and made part of the record, which is accordingly done.

JOHN C. WATROUS. [L. S.]

And afterwards, to wit, on the second day of August, of the same year, the court here made an order in this cause, which is as follows, to wit:

Order of Court.

BURNLEY & PORTER
v.
WILLIAM M. COOK et als. } No. 441.

This day came on to be heard the motion for a new trial, and for

arrest of judgment in the above cause of defendants, and the evidence adduced and the argument of counsel having been heard therein, and the same being duly considered by the court, it is ordered that said motion be overruled.

The defendants applied to the court to fix the amount of the bond for writ of error, and thereupon it was agreed by the counsel, and ordered by the court, that seven thousand dollars should be the amount of such bond.

And afterwards, to wit, on the 12th day of August, 1859, the defendant executed and filed his bond for appeal, in the words and figures following:

Bond of Appeal.

Know all men by these presents, that we, William M. Cook, J. M. W. Hall, A. S. Ruthven, William Ferguson, Jerry Smith, are held and firmly bound unto Albert T. Burnley, of the State of Kentucky, and Royal A. Porter, of the State of Louisiana, in the full sum of seven thousand dollars, lawful money of the United States, to be paid to the said Burnley and Porter, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 12th day of August, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas, lately, at a term of the District Court of the United States for the Eastern District of Texas, holding its session in the city of Galveston, said State, in a suit depending in said court, between the said Albert T. Burnley and Royal A. Porter, plaintiffs, and William M. Cook, Chambers Etter, Daniel Elam, George B., Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, and Samuel A. White, defendants, judgment was rendered against all of the said defendants, except Samuel A. White, who by leave of the court severed from the other defendants, and in favor of the said Albert T. Burnley and Royal A. Porter; and the said defendants having obtained a writ of error, and filed a copy thereof in the clerk's office of said District Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert T. Burnley and Royal A. Porter, citing and admonishing them to be and appear at a Supreme Court of the United States of America, to be holden at the city of Washington, on the first Monday of December next.

Now, the condition of the above obligation is such, that if the said William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, shall prosecute their writ of error to effect, and answer all

damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

WM. M. COOK, [L. S.]
G. M. W. HALL, [L. S.]
A. S. RUTHVEN, [L. S.]
WM. FERGUSON, [L. S.]
J. SMITH. [L. S.]

Approved.

JOHN C. WATROUS.

And afterwards, on the 12th day of August, A.D. 1859, the said defendants filed their writ of error, as follows:

Writ of Error.

United States of America, *ss.*

The President of the United States to the Hon. the Judge of the District Court of the United States for the Eastern District of Texas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you, between Albert T. Burnley and Royal A. Porter as plaintiffs, and William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks defendants, a manifest error hath happened, to the great damage of the said William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, as by their complaint appears. We being willing that the error, if any hath been committed, should be duly corrected, and full and speedy justice be done to the parties aforesaid, in their behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court, to be then and there held; that the said record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, this 12th day of August, in the year of our [L. S.] Lord one thousand eight hundred and fifty-nine, with the seal of the court.

Approved by

JOHN C. WATROUS,
Judge District Court U. S., Eastern District of Texas.

I acknowledge service of the foregoing writ of error, August 12th, 1859.

W. P. BALLINGER,
Attorney for Burnley and Porter, defendants.

The United States of America, Eastern District of Texas.

I, James Love, clerk of the District Court of the United States of America for the Eastern District of Texas, at Galveston, certify that the foregoing four hundred and thirty pages contain a true and perfect transcript of the record, and all the proceedings had in the cause number 441 on the law docket of said court, wherein Albert T. Burnley and Royal A. Porter are plaintiffs, and William M. Cook and others are defendants.

In testimony whereof, I hereunto set my hand and affix the seal of [L. S.] said court, at the city of Galveston, this thirtieth day of November, A.D. 1859.

JAMES LOVE,
Clerk.

United States of America, *ss.*

The President of the United States to the Honorable the judge of the District Court of the United States for the Eastern District of Texas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Albert T. Burnley and Royal A. Porter as plaintiffs, and William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, defendants, a manifest error hath happened, to the great damage of the said William M. Cook, Chambers Etter, Daniel Elam, George B. Sheppard, Joseph H. Baldridge, Charles A. Harper, and Daniel P. Sparks, as by their complaint appears. We being willing that the error, if any hath been committed, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the said record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, this 12th day of August, in the year of our [L. S.] Lord one thousand eight hundred and fifty-nine, with the seal of the court.

Allowed by

JOHN C. WATROUS,
Judge District Court U. S., Eastern District of Texas.

I acknowledge service of the foregoing writ of error, August 12th, 1859.

W. P. BALLINGER,
Attorney for Burnley and Porter, plaintiffs.

SUPREME COURT

OF THE

UNITED STATES,

December Term, 1866—No. 23.

WILLIAM M. COOK ET AL.,
PLAINTIFFS IN ERROR,

VS.

ALBERT T. BURNLEY, ET AL.,
DEFENDANTS IN ERROR.

ABSTRACT AND POINTS FOR PLAINTIFFS IN ERROR.

MERRIMAN, FOR PLAINTIFFS IN ERROR.

INDIANOLA, TEXAS:
PRINTED AT THE OFFICE OF THE TIMES.
1866.

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1866.—No. 23.

WM. M. COOK, ET AL., PLAINTIFFS IN ERROR.

VERSUS

ALBERT T. BURNLEY, ET AL., DEFENDANTS IN ERROR.

ABSTRACT AND POINTS FOR PLAINTIFFS IN ERROR.

This case is brought into this court by a writ of error from the District Court for the Eastern District of Texas.

The defendants in error, Burnley and Porter, filed their petition in that court on the thirteenth day of October, A. D. 1853, against the plaintiffs in error, Wm. M. Cook and others, for the recovery of a league of land, which they represent, and call the Juan Cano league, which they charge to have been occupied by the defendants in the District Court.—[Print. Rec. 1.]

These defendants, Cook and others, claim a tract of land by virtue of a location and patent, situated on, and embraced within, the junction of Powderhorn Bay, or Lagoon, and the waters of Matagorda Bay, on what may be considered an island in fact, as the wide body in the rear connected with the waters of Matagorda Bay by the Powderhorn Bay on the one end and a lagoon on the other, through which the tide ebbs and flows.

The plaintiffs in the District Court claim that the land embraced in the limits of defendant Cook's location and survey is covered by the grant from Fernando De Leon, commissioner of De Leon's colony. The city of Indianola is on the land in dispute. A general denial was interposed by the defendants, and also an agreement that the defendants might prove every fact which they could under any plea whatever.—[Print. 42.] Exceptions were taken to the refusal of the Court to admit the record of a suit pending in the State Court of Harris county, to abate the present suit, which was offered under this agreement.—[Print. Rec. 76–101.]

The defense consisted in controverting the validity of the title

of the plaintiff in the District Court, or that it embraced within its legitimate boundaries the land located on by Cook and claimed by the defendants; and, if it did, plaintiff's right of action was barred by the statute of limitation, and that in any event the title set up by the defendants, being the location and patent to defendant, Cook, was the better title.

At the outset, one of the defendants, Cook, made his application for a continuance, founded upon his affidavit, which was denied, and the ruling excepted to.—[Print. Rec. 33.]

The defendant, Cook, afterwards filed his motion for change of venue, predicated upon facts embodied in a statement sworn to by him. This motion was also denied, and the denial excepted to.—[Print. Rec. 35.]

On the trial of the cause, the plaintiffs in the the District Court, in support of their case, introduced a paper, purporting to be the testimonio of a colonial grant, dated in April, 1835, and purporting to be made in pursuance of the colonization laws of Coahuila and Texas of 1825, [Print. Rec. 50–56,] to the introduction of which the defendants objected on the following grounds:

1st "That the title had not been recorded in the county where the land was situated.

2d. "It had not been recorded or deposited in the General Land Office of the State of Texas.

3d. It had been changed or altered by the insertion of a map or plat of the land," etc.

Which objections being overruled, the ruling was excepted to. It was, at the same time, agreed by the parties that the title should be sent up with the record for the inspection of this court. [Rec. 56.]

The plaintiffs below assumed to claim title, first from Cano, and from Cano to Leonardo Manso, (who, in the printed record, is sometimes by mistake called Manse, and sometimes Mauro,) by deed, dated May 28, 1835, from Manso to Greyson, dated in Louisiana April 6, 1836, which last was excepted to by the defendants on the grounds that it was secondary evidence and no legal grounds laid for its introduction, and that Manso was an alien and an alien enemy; which objections were overruled and the ruling excepted to.

The will of Greyson—deed and note of hand from Greyson to Lambeth. To the last objections were made: 1st. That it was not executed in conformity to the laws of Texas, etc. 2d. That it contained no sufficient interest to maintain an action of trespass; which objections were also overruled and the ruling excepted to by the defendants. Then a deed from Lambeth to Levi Jones.—[Rec. 56–70.]

The plaintiff also produced a paper, styled a deed and note from

Greyson to Lambeth, which was also objected to and the objection overruled and exceptions taken.—[Print. Rec. 66, 67.]

The Court also admitted a paper from Lambeth to Levi Jones, which admission was excepted to [Rec. 67–76] as being only a mortgage, and not sufficient to sustain an action of trespass.

After the introduction of various testimony, documentary and otherwise, both for the plaintiffs and defendants, the plaintiffs offered [Print. Rec. 165] the testimony of a grant to Benito Morales, as tending to explain the grant in controversy and the upper lines thereof and its termination, to which the defendants objected, that grant not being in controversy and not admissible in this case for any purpose; this objection was overruled by the Court, and exceptions taken thereto.

The plaintiffs also offered as evidence a copy of a deed from Cook to Brown, which had been filed in the case of Burnley et al., *vs.* White et al., but not in this case. The very sensible ground of objection was taken that since Cook was not a party to that suit, and was not bound by the acts of the defendants therein in filing papers and making statements in their answers, and that the exhibit did not purport to be a copy of any deed made by him the said Cook; but the Court overruled the objections, to which ruling the defendants excepted.—[Rec. 179, 180.]

After the introduction of some further testimony and documents, the evidence for plaintiffs and defendants closed. Instructions were asked for by the defendants and refused, and those asked for by the plaintiffs were given.—[Print. Rec. 190, 191.] The refusal to give those asked for by defendants, and the giving those of the plaintiffs, was excepted to by the defendants.

These instructions will appear fully hereafter, embodied in the points taken and relied on by defendants.

The plaintiffs in error will rely upon the following points:

I. It was improper for the Court to have entertained the cause after the presentation of the facts embraced in the application of the defendant, Cook, for a change of venue, from which it certainly would appear that the personal feelings of the presiding Judge of the District Court were too embittered toward the defendant, Cook, for the propriety of his adjudicating the cause to go unquestioned. Feelings engendered by the existence of such facts, must create a stronger prejudice than disqualification occasioned by interest or consanguinity. The cause presents the anomaly of a mass of legal questions being raised during the trial, none of which were ruled in favor of defendants.

II. Error in denying the application for a continuance was palpably committed.

It appears from the terms of the statute, art. 439, Oldham & White's Digest, and also by the rulings of the Supreme Court of Texas, that when the statute is complied with, as in this case, there is no discretion left with the Court, and it is error to refuse a continuance, and the refusal may be assigned for error. This is settled in the case of Prewett *vs.* Everett, 10 Texas Rep. 283.

III. Whether the testimony introduced by the plaintiffs in the District Court, purporting to be a title from the commissioner, De Leon to Juan Cano, should have been admitted, against the objection that "it had been interpolated, changed, or altered by the insertion of map," etc., the present counsel, not having seen the original or the map, cannot speak advisedly; but as, by the agreement of the parties it is transmitted to this Court for its inspection, the attention of the Court is respectfully invited to it. [Rec. 56.]

It is persistently denied, however, that, from the facts subsequently disclosed during the trial of this cause, the plaintiffs in the District Court had any rights which could be derived by virtue of that document; and insists that it should have been rejected by the Court and disregarded by the jury.

By an examination of the testimony, it seems quite evident that there was no such colonist in De Leon's colony at the time, or subsquent to the date of that testimonio, by the name of Juan Cano, to whom the title purports to have been made. That there was a person by that name, a *Mexican Peon*, ranging about the country temporarily in this colony, is possible. Most of the witnesses deny there being any such colonist. To be a colonist, in the true sense, requires the ability and disposition to fulfill the duties incident to a colonist in its true spirit and meaning—all of which were wanting in this case.

The title itself required the grantee, within one year from its date, to "construct landmarks of stone and lime on each of its corners," and occupy and cultivate, according to the provisions of the colonization laws: that is, payment to be made as required by art. 22, occupation and cultivation according to the provision of articles 24, 25 and 26 of the colonization of 1825, or the same would be considered as *renounced*. The 27th article of that law prohibits him from alienating the land before he had "entirely cultivated it." The 19th article of the colonization law of 28th April, 1832, prohibits the alienation until "after six years from the time of taking possession." We see that a compliance or performance with these terms are disproved by the evidence. The title is dated the 11th of April, 1835. The conveyance from Cano to Manso the 28th day of May, 1835. This alienation was

in violation of both the 27th article of the colonization law of 1825 and the 19th article of the colonization law of 1832. The deed from Cano to Manso was therefore void; and further, he had no right to the land in question to alienate.

This being done before the Texas Revolution, there was a legal renunciation of rights that might have been supposed to have existed. It is settled in the case of Horton *vs.* Brown, 2d Texas Rep. 78, 1 Texas Rep. 401, 602; Rivers *vs.* Foot, 11 Texas 662, that acts of forfeiture restores the land to the public domain without *inquest or office found.* The acts of forfeiture having occurred before the declaration of independence, will distinguish this case from the case of McMasters *vs.* Jones et al., decided in 20th Howard.

IV. Exceptions were properly taken to the introduction of the deed from Manso to Greyson, dated April 6, 1836, that Manso was an alien. War existed at that time between Mexico and Texas. Manso describes himself in that deed as a citizen of Mexico. The plaintiffs in the District Court were concluded by that, as up to that time there was no other proof on that subject.

V. We believe that the District Court should have given the instructions asked for by the defendants, viz: That "if Manso was an alien enemy at the time he executed the deed to Greyson, he conveyed no title through which plaintiffs can recover."

Most of the testimony on that point indicates clearly from facts given that the *status* of Manso at that time was that of an alien enemy. It is shown that although he might have been a Spaniard by birth, he became a Mexican citizen. Caravajal says, in in his testimony, [Rec. Print. 71,] that "Manso came to Mexico very young, and became an officer in the Mexican army, and joined the cause of independence in 1821, and became by that act a citizen of the Mexican Republic—that he was an officer in the Mexican army." That he was, and maintained the *status* of a Mexican before, during and since the war, was also corroborated by most of the witnesses; and it would only be reasonable to suppose that if this instruction had been given, the jury would have found for the defendants.

There is no evidence that he was actually forced to leave the country, if he was a citizen of Mexico. No order for the expulsion of the Spaniards would apply to him. He might have *excused* himself from remaining on that account: his subsequent action in remaining away, indicated what his intentions really were. If he was actuated by fear, according to the decision in the case of Texas *vs.* Casenove, 1st Texas Rep. 401–406, wherein the Court say that "a flight to Mexico through *fear,* and his residence there, was incompatible with his residence in Texas,

and was equivalent to his refusal to participate in the war," he was no less an alien enemy.

V. The District Court should have given the second instruction asked for by the defendant's counsel, viz: "If the plaintiffs' title was not on record in the county where the land lies, or in the General Land Office, at the time the defendant located and completed his survey and obtained his patent, he is in the position of an innocent purchaser, and entitled to recover."

This objection was also taken to its indroduction as evidence. [Rec. 56.]

The Supreme Court of Texas, in the case of Gilbrau *vs.* May, 15 Texas Rep. 410, takes the ground—and very decidedly, too, after a full discussion of the question—that unless it is *proved* by the party relying upon his testimonio that his title was deposited in the General Land Office, it would constitute no valid title as against a subeequent *locator* without notice.

This decision was in that case intended as a definitive establishment of that doctrine as a settled rule of law in this State. The private opinion of the Justice delivering the opinion of the court went farther, viz: That the failure to record would vitiate the title as against a locator, *even with notice;* but as it had been previously decided in Crosby *vs.* Houston, that notice would affect him, he yielded that point in deference to the former ruling.

It is true that Justice Hemphill, in a subsequent case, Byrn *vs.* Fagan, 16 Texas 391, intimated that there was a presumption in favor of the deposite of the *protocol* in the General Land Office. This was seemingly mentioned incidentally, the case being controlled by the construction of a local law having reference to the counties therein mentioned. No reference was made in that opinion to the case of Gilbrau *vs.* May, further than to reassert that portion of it which says that the "deposite of titles in the General Land Office would be regarded as notice." It certainly could not have been the intention of Justice Hemphill to have really established a doctrine adverse to the law, as deliberately settled by the whole Court in the case of Gilbrau *vs.* May, more particularly so without reference even to *that portion* of the opinion. If it should appear that he did so, the doctrine would be so unreasonable that in such a conflict this Court would settle it upon the more reasonable and sensible ground. If the title was so defective, it would be an easy matter for the party relying upon it to show the *affirmative* by the proper certificates.

If it could be said that any presumption arose, in the absence of proof, that the *original* was deposited in the General Land Office, the presumption would be equally strong that the commissioner of the Land Office would not have issued the patent, he

being presumed to know if such archives or documents were in his office, or whether the land had been already appropriated.

However, in this case, by reference to the session laws of the Legislature of the winter of 1849 and 1850, page, 142, we find a law passed on the 8th February, 1850 authorizing the commissioner of the Land Office to receive and deposite in his office the archives of Martin De Leon's colony. We see here evidence positive that up to that time no archives or titles of that colony had been deposited.

In this case there is no evidence that the defendant, Cook, had any knowledge of any such title existing at the time he made his location and survey. No public notoriety of the fact shown. No fact shown which could be a compliance with the terms of the laws necessary to make a valid grant. No possession by any one claiming under such a title. No landmarks to designate it appears, to put a person on inquiry. And if any such facts did exist, or facts which were calculated to put him on inquiry, they certainly would have appeared in some shape among the mass of testimony taken in the cause on both sides.

It will be perceived that Cook's application, denouncing the land, was made on the 5th of January, A. D. 1847, [Rec. 109,] from which time it is contended his right attached, although the survey appears not to have been made until the 15th day of May, 1850.

VI. It is not improbable that the jury would have found for the defendants had the fourth instruction been given as asked for by the defendants, viz: "That if the plaintiff's title included an island surrounded by tide water, it was bad as to the island." There was evidence tending to show the affirmative of the instruction asked for. See Theilepape's testimony, Rec. 136.

VII. The 5th instruction was also improperly refused. There was evidence tending to show, as by the return of the survey of Beaumont and the plat made by Theilepape, that the third line of the survey would have run its distance at a point on the lagoon, from which, according to these surveys, the line must necessarily run down this lagoon, or perhaps it might be called the real bay shore, as intended in the original title; in which case it would not include Cook's location, and the jury could have fairly and justly construed both plaintiffs' and defendant's titles, so that they could have both stood—which it was their duty to do.

VIII. In giving the instruction asked by the plaintiffs, the Court erred, as this instruction assumes facts which were not positively shown.

IX. The verdict was contrary to law and the evidence, and the jury should have found for the defendants, inasmuch as, in addition to the grounds taken in the foregoing points, it is clear from the evidence, that as early, at least, as the spring of 1850 Cook was in the possession of the land located on by him under title from the *sovereignty of the soil*, and so continued by himself, agent, or workmen for more than three years before the bringing this suit.

Although there were no instructions asked for on this point, and none given, unless it was given orally and in the shape of an argument by the Court, as appears by the bill of exceptions. There were, however, the amended pleas of the defendants, [See Rec. 27,] setting up these facts, which were fully sustained by the proof.

X. It is too late, of course, to question the right of Martin De Leon to his *empresa*, or the right of Fernando De Leon to extend titles in that colony; and although we believe that his augmentation, from its calls, would not embrace the large extent of country claimed by it, still we cannot appeal to this Court at this time for its correction with any hope of success, but believe it would be so decided by the Supreme Court of Texas, should the question be brought before them and properly explained. However, we *do* say, and contend, that when titles were extended to sundry *peons* and *vassals* for the *purpose* of becoming immediately united in one person, and that their master—as appears to have been done in this case and in the case of Burnley et al. *vs.* White et al., in 20 Howard, and in other instances wherein the titles have been immediately transferred to this Manso, plainly violating the spirit of the colonization laws, which were intended to limit the quantity of land to one league and labor for each colonist—that *fraud* is too plainly visible.

MERRIMAN,
for Plaintiffs in Error.

No 13

IN THE COURT OF CLAIMS.

WILLIAM M. COOK *et al.*

PLAINTIFFS IN ERROR,

vs.

ALBERT T. BURNLY *et al.*

DEFENDANTS IN ERROR.

Plaintiff's Brief.

In addition to the former briefs in this case, the plaintiffs in error suggest the following:

On the parts of the plaintiffs this tract of land, 179½ acres, is claimed under a title from the State of Texas in favor of William M. Cook, one of the parties to this suit, who laid out the same into town lots and conveyed to the other of the plaintiffs in error, the decision of which title invokes the question whether the inhabitants of the town of Indianola, the most populous and flourishing town on the coast of Texas, (Galveston excepted,) are occupying their own real estate or that of the defendants in error in this case. The title under which the plaintiffs in error claim is not disputed, except as it is claimed to be included

within the said grant to Cano, and that the said grant to Cano is the prior, and, consequently, superior title.

Divers questions arise upon the title of the plaintiffs below. Their title is based upon the colonization laws of Mexico of 1825 and 1827, under which laws Martin DeLeon established a colony in Texas, with power to grant titles.

This colony was established under the laws then in force prohibiting the settlement of colonies within ten leagues of the coast, *where* grants of land to colonists without the approbation of the General Government obtained were void.—Art. 7, Colonization Laws of 1825. (Goode *vs.* McQueen, 3 Texas, 241; Thorn *vs.* The Republic, 3 Texas, 499; Edwards *vs.* Davis, 3 Texas, 321.)

The first question we shall consider is whether the land in dispute lies within the boundaries of the DeLeon colony; for if it lies outside of that colony, then the Empresario, or commissioner of said colony, had no jurisdiction in the premises and no power to make the grant. As this Court say in 20 Howard, 246, (White *vs.* Burnly,) "If the premises were true the conclusion would certainly follow."

The plaintiffs below neglected to introduce any evidence to connect this tract of land within the limits of said colony, a fact which would in ordinary actions of ejectment defeat a recovery, this being one of the essential features of title. But as the courts of Texas have, in some instances, adopted a system of proving titles by common report, known as "historical facts," the plaintiffs below rested this portion of their case solely upon the court's version of history.

This Court, in the case of White *vs.* Burnly, above cited, refers to the case of DeLeon *vs.* White, 9 Texas, which is but a continuation of the case of Bissell *vs.* Haines, reported in the same volume, (9 Texas, 556,) in which case is contained the history of this colony, with its original boundaries, as well as the augmentation thereof.

On page 560, of 9 Texas, is contained the petition of Martin DeLeon, dated August 1, 1825, for the establishment of

the boundaries of his colony, as follows: "It is understood by the families of the settlement that its boundaries are from the Anastatia Ford, where the road from La Bohia to Nacogdoches crosses the river Guadaloupe on a straight line north to the La Vaca creek, and with these two streams, La Vaca and Guadaloupe, eastward to *the line of the ten coast leagues*, which district of country is not known to them, and for the possession of which I now claim your favor and protection, by virtue of the ninth article of the Supreme Decree of August 18, 1824.

On the 27th of May, 1827, DeLeon petitions for the appointment of a commission and praying that his (DeLeon's) boundaries should be from point at "which the boundary line of the two coast border leagues crosses the river La Vaca, thence with its right bank upwards to the road leading from La Bahia del Expirita south to Nacogdoches, thence on a straight line south with said road to the river Guadaloupe at the place known as Anastasia Ford, thence with the left bank of said river to the farm (ranch) San Francisco, (which, although *perhaps* within the coast border leagues, your petitioner thinks may be permitted to remain within his boundaries, as he settled it previous to the publication of the general colonization law, and because he has his stock of cattle and horses on it, and accustomed to the place,) and thence on a straight line to the river La Vaca at the place of beginning, permitting him to designate by landmarks the few points of its boundaries." See page 561, 9 Texas.

This was the colony as by the first contract.

On page 562 of same, is contained the boundaries of the second contract or augmentation, of date, April 30, 1829, as follows:

"Beginning at La Vaca Creek, near the place where it is crossed by the middle road leading from La Vaca Nacogdoches, and thence run one league with said creek upwards, thence a line shall be run parallel with said road to cross

the river Guadaloupe at the Lego ford until it strikes Coleto creek, thence with the creek downwards, the survey terminating at its junction with the aforesaid Guadaloupe."

Thus it will be seen that under the said contracts nothing was claimed within the ten litoral leagues of the coast except the San Francisco ranch, which was asked for by DeLeon as having been occupied by him, and which adjoined the colony; whereas the land in dispute borders on the coast, a distance of nearly thirty miles from the southern line of the colony.

Whether DeLeon ever had any other contracts or power as commissioner, is not shown, nor is it deemed material; for the grant under which this title is claimed is based upon the first and second contracts of DeLeon, which grant contains the following recital: "Commissioned by the Executive Department of the State of Coahuila and Texas, for distributing and giving possession of vacant lands to the colonists introduced by the Empresario, Martin DeLeon, by virtue of his first contract and approbation of his excellency the Vice-President of the Republic, communicated by the Secretary of Relations to his excellency the Governer of the State, and passed on the 10th of March to the political chief of this department, and to those he is to introduce, by virtue of his second contract, between the river La Vaca and Coleto creek."

As these contracts are recited as laying between the La Vaca and Guadaloupe rivers and the second contract between the La Vaca river and Coleto creek, an easterly branch of the Guadaloupe river, the lower line of which is the junction of the Coleto creek with the Guadaloupe river, it will be readily seen by reference to a map of Texas that this land, lying on the Bay, could not by any possibility be comprised within limits of the said original colony, or the augmentation thereof.

It is therefore contended by the plantiffs in error that the defendants in error failed to show title to the land in

dispute, by failing to show authority in DeLeon to issue grants outside of his colony, or beyond the limits of the first and second contracts.

The Court will take individual notice that the land claimed to have been granted, lying, as is contended, on Matagorda Bay, within the coast leagues, are not in the first or second colonial contract, therefore is unauthorized.

When the Court comes to consider the question of notice and recording, the bearing of the above facts on that point will also be apparent. Every document connected with this colony, open to public inspection, would indicate to the locater that the land in dispute was not embraced in that colony. And on this question the defendant's counsel, in his brief, misstates the testimony of Edward Lynn, as Lynn says nothing about delineation on the *County* map.

Here was a piece of land surrounded by tide-water, in fact, an island in the Matagorda Bay, situate thirty miles from the DeLeon Colony, lying within the coast leagues. No land marks, as required by the laws under which said grant was made, or evidence of any sort to denote any claim of any person, no records of any adverse claim or tenury, either in the General Land Office, or in the County, and under such circumstances it would require pretty positive notice of an unrecorded title, which had remained for so many years; and even if Cook had incidentally heard that there did exist a grant to this man Cano as one of DeLeon's colonists, there was nothing to induce him to think that it might extend so far from the colony; or if it did that it could extend from the mainland over the leagues intervening and include this island. Lynn's testimony, which is solely relied upon for notice, is entirely too indefintte.

In this connection, we may also refer to the survey of this league, made by the surveyor appointed by the Court below, wherein the third line of the survey terminates at the lagoon outside of the island.

As to the question of the shape of the grant previously referred to in our brief, we would add, that unlike an excess in the quantity, the shape shows on its face to the grantee that it is made in violation of same, which is necessarily known not only to him, but to the surveyor and to the commissioner.

The statement of defendants' counsel that there were three applications for continuance, is a mistake. This was the second application—though copied twice in the same record—and the statute referred to by us heretofore defines what shall be stated in the first and what in the second application for a controversy.

W. & A. L. MERRIMAN,
For Plaintiffs in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

ERROR FROM THE DISTRICT COURT OF TEXAS.

WM. M. COOK, ET AL, PLAINTIFFS IN ERROR,

vs.

ALBERT T. BURNLEY, ET AL, DEFENDANTS IN ERROR.

ARGUMENT FOR PLAINTIFFS IN ERROR.

No.....

INDIANOLA, TEXAS:
PRINTED AT THE INDIANOLA "BULLETIN" BOOK AND JOB OFFICE.
1867.

In the Supreme Court

OF THE

UNITED STATES.

ERROR FROM THE DISTRICT COURT OF TEXAS

WM. M. COOK, ET AL, PLAINTIFFS IN ERROR,
vs.
ALBERT T. BURNLY, ET AL, DEFENDANTS IN ERROR.

ARGUMENT FOR PLAINTIFFS IN ERROR.

This is an action of trespass brought by the Defendants in Error, by their petition filed in the District Court, on the 13th day of October, 1853, and which was afterwards made an action to try title by endorsment on the petition, as required by the Statute of Texas, as provided in Art. 2039, Oldham and White's Digest; and was tried before the Hon. John C. Watrous, Judge of the District Court of Texas, having Circuit Court jurisdiction, at its June Term, 1859.

Referring the Court to the Brief of the Plaintiffs in Error, heretofore filed in this Court, for a statement of the case and points relied on, we now present some additional points and authorities; also giving more fully the reasons why we contend that the judgment and verdict given against the Plaintiffs in Error was erroneous, and ought to be reversed.

Before proceeding to investigate the merits of the titles, there are some preliminary questions which require notice.

Prior to the commencement of the trial in the Court below, the Defendant, Cook, made an application for a continuance: Rec. page 33, 1st Bill of Exceptions. This application was based upon Cook's

affidavit showing the absence of a material witness, and, to procure the attendance of whom there was no laches, and a full compliance of the terms of the law. The authorities on that point are clearly and well established, that the Statute having been complied with, there was no discretion left with the Court, and its refusal to grant the continuance was error, and subject to a revisal in this Court. The Statutes on which the application was made, is contained in Art. 438, Oldham and White's Digest. The decisions of the Supreme Court of Texas on that question are, Hipp vs Bissell, 3d Tex., 18; Henley vs. Little, 5th Tex., 397; Prescott vs. Everett, 10th Tex. 283.

On the same day, the Defendant, Cook, filed his affidavit as a basis of a motion for a change of venue: See Rec. 35, in which is embodied extracts from a pamphlet issued and circulated by the Judge on the Bench, attacking the personal character of the Defendant, Cook, and in fact stating his opinion of the titles involved in this very suit, adversely to Cook. This affidavit also asserts that the presiding Judge had acted as counsel for the adverse parties on the subject of the titles in controversy herein. These facts it will be perceived, were not controverted by the Court, but the order thereon was simply that the law was against the application.

It is necessary, only, to inspect the record of the proceedings in the case, and notice the different rulings against the defendants in the District Court, to discover that Cook had very serious grounds for apprehension as to the result of his cause, should it be tried before the Judge who had expressed himself so freely in opposition to Cook's rights, and attacked so bitterly his personal character. All the acts and all the rulings of the Judge, evinced a persistency in sitting upon and adjudicating the cause, and producing results unfavorable to Cook; to say nothing of a peculiar manner of treating testimony, and such remarks and inuendos which would necessarily produce their effect on the minds of the jury, which might occur, but could not appear on the record. *He did* try the cause, and he left but little for the jury to decide. Under the circumstances, and taking the merits of the application into consideration, we assert that it was the duty of the Court to have granted the application: See Acts of Congress, March 3, 1821, page 639; same, May 8, 1792, page 104; Act of 24th September, 1789, page 71.

Let us now examine the merits of the title relied on by the Plaintiffs in the Court below, as the validity of that is necessary to be shown, otherwise their action fails—this action being expressly to establish that title.

The title set up by them to sustain their cause, they claim to be derived from one Juan Cano, to whom they allege was granted the league of land described in their petition, from one Fernando de Leon Commissioner, and which they contend embraces the land in controversy and claimed by Cook, viz: 179½ acres at the junction of Powderhorn Bayou and Matagorda Bay. This grant purports to have been made on the 11th of April, 1835. The only authority on

the part of Fernando de Leon to make this grant is shown by his own testimony, interested, as he is, in sustaining his own acts.

1st. This grant seems to have been procured in a very irregular and imperfect manner.

The Empresario, Martin de Leon, died in 1834, as stated by Z. D. Wright, page 117, and that there was no Empresario empowered to act after his death. His colonial contract expired by limitation of law on the 30th of April, 1835, nineteen days after the date of the so-called Cano grant. It should at least appear that the grantee had settled and obtained rights in the colony in *good faith* during the life-time of the Empresario, otherwise, there is no authority for the grant. The contract between the State and Martin de Leon was of a personal nature, and, he dying, the contract died with him, and nothing more could be done than to confirm previously acquired rights, which, in this case, does not appear.

The hurried manner in which these grants were issued—all in a few days—the surveys extending across bays eight miles long and four wide—containing an excess of over a league, all point to a commission of fraud on the State.

We cannot reconcile the fact that a title can be made in this manner, with our ideas of the proper mode of disposing of public lands; nor can we concede the privilege of sustaining them by the evidence of such witnesses as Caravajal, to show what the law was, particularly when we see him undertaking to controvert the provisions of Art. 22 of Decree No. 272, hereafter referred to, by saying that it applies only to sweet water courses! He has made the same mistake in asserting the custom of running lines over large bodies of water. This decree would impliedly prohibit that also.

The survey made by Beaumont, from the field notes furnished by the Court—see page 124—shows an area of upwards of two leagues in this so-called Cano grant; an excess which is not accounted for, if that *could* be done. It is presumed this excess occurred by means of the original Mexican survey, having been made after the plan mentioned by T. Hanson, (page 119,) which he says was sometimes done by a "trotting horse," and in this case, making use of a very fast trotter.

2d. There is another objection to this grant, apparent on its face, which must prove fatal to its validity, and render it a nulity. In the Decree No. 272, of Coahuila and Texas, made on the 26th of March, 1834, Art. 22d, page 250, and which was passed before the date of the so-called Cano grant, it is provided that lands fronting on prominent creeks, rivers, large lakes, *bays and the sea-shore, shall run back double their front.* How do we find the position and shape of this grant, as applied to that law? A glance will readily show that the front of this grant, on the bay, as alleged, *is far in excess of its depth,* being over six miles. This is one of the many items observable in this case, showing, on the part of the Commissioner and others concerned in these grants, a disposition to disregard all the obligations imposed upon the Commissioner and the grantees,

by law, and the real intent and object of the establishment of this colony, when interfered with their private speculations.

3d. Another objection to the validity of this grant, although not appearing on its face, but taken in connection with the immediate transfer from Cano to Manso, and the deed from Manso to Greyson, the last embracing, as it does, sixteen leagues, is made apparent: See Rec. 57. It will be born in mind, as the history of this colony shows, that this grant and the other league grants, which make up the sixteen leagues mentioned in the deed from Manso to Greyson, were made at nearly the same time, and nearly at the same date to Manso. These grants were made, it is evident, to different ones; ostensibly to comply with the letter of the colonization law; probably to *peons* or servants of this Manso, and immediately turned over to him by these *bogus grantees*, for the purpose of uniting in this one person this immense tract of land. The colonization law of the General Government, Aat. 12; Col. Coahuila and Texas Art. 24, and the 11th Art. of Decree No. 272 of the State above referred to, prohibit the uniting in one person more than eleven leagues. If the 36th Art. of this last Decree, giving permission to *settlers* to alienate their lands, authorized Cano and the other grantees to alienate, it imposes upon the purchaser all the obligations of an original grantee, and we assert that a purchaser could have no better or other privileges, either in accumulating an excess in his hands, or avoiding the duties of an original colonist, than if he were the first grantee. It is evident, therefore, that in this case there was the intention, from the start, to avoid the spirit of this law and this Decree; not to receive this league of land in good faith, and incur the obligations of colonists, but in violation of law, and for private speculations.

As we have before stated, the main and only object of those colonization laws, and the extending those colonial contracts were the *settlement* and *cultivation* of the country. Was it possible to accomplish those objects by ceding lands to such persons, perhaps imaginary ones—as this Cano, whom their own witnesses say was then entirely unknown as a colonist? See testimony of N. Benevidas, M. T. Wright, Rec. 75; John D. Wright, Thos. Hanson, 117, 119. If he was not a colonist, the grant was void, as the Commissioner was only authorized to extend titles to *colonists*. The validity of these titles must be measured by the policy of the State in authorizing their issuance.

4th. This title also required the grantee, in obedience to Art. 6, of the instructions to Commissioners, 768 Oldhan and White's Dig., to construct land marks of stone and lime, at each angle of the land within one year. This is shown never to have been done, even up to the time it was surveyed by the order of Court. There was then no compliance with the conditions of the grant by Cano or by Manso, the vendor, if that fact would have cured the title, by occupying and cultivating the land, whereby the lands became "entirely vacant," and were so before the Texas Revolution; and if the forfeiture occurred before that period, by the provisions of Art. 7, Sec. 20, Constitution of the State, the land became vacant, and not pro-

ceeding in the nature of "office found" were required, as will also be seen by reference to the authorities cited in our brief on this point. Again, the deed from Cano to Manso might be regarded as void as made in violation of the Col. law of 1825, 27th Art., prohibiting the sale until the grantee had cultivated his land. It is true the 36th Art. of Decree No. 272, allows *settlers*, who have received titles, &c., to sell; but could Cano be regarded as a *settler*, when it is shown that he never did settle on the land? We contend that a claimant must first settle on his land before he can avail himself of that provision.

When we take into consideration how important intervening rights may be effected, we can fully appreciate the motives of the law-making powers in requiring these conditions, made to secure the objects of extending these colonial contracts and titles, and to serve as notice to the world that the land has been appropriated, to be complied with; and it is the duty of Courts to construe the facts in each case in such a manner as to carry out the same objects.

Greyson, to whom Manso conveyed, died about the year 1840; the conditions of the grant were not complied with at the time of his death, nor any occupation or cultivation or other indicia to show that the land had been appropriated.

We now come to another objection to this grant and which was interposed by the Defendant in the District Court in the shape of exceptions to its admissibility in evidence, and instructions asked for and refused by the Court: Rec. 56. It is that the title set up by the adverse party had not been deposited in the General Land Office, or recorded in the county where the land lies. None of the deeds or other evidences of title, from de Leon down to Greyson, were recorded in the proper county: See G. W. Garrett's Dep. page 118; nor was the original deposited in the Land Office.

The General Land Office in Texas was established in 1836. The Legislature enacted, on the 20th of December, 1836, that any person owning lands should, within twelve months, have their titles proved in open Court, and recorded in the county where the land lies: See 9–40 of the same act provides: No deed shall effect the rights of third parties unless proven and recorded. On the 14th of December, 1837, it was further provided that it shall be the duty of every person having titles to deposit them in the General Land Office within sixty days.

These laws seem to require absolutely that titles should be so deposited and recorded to operate in any event against the intervening rights of third persons; and such was the opinion of some of the members of the Supreme Court of the State; but as will be seen by reference to the case of Gilbran vs. May, 15 Tex. 410, it was determined to subject the intervening rights of third parties to the question of actual notice. In this case then, the question of actual notice arises at this point. The title of Cook is not disputed except so far as it interferes with the alleged prior title of Plaintiffs. Cook's title to the 179½ acres consisted of the location of a land certificate

made by him on the 5th of January, 1847: Rec. pages 103-220; and surveyed on the 5th of May, 1850, and patented to Cook.

Now, had Cook notice *aliunde*, at the inception of his rights, that there was any valid subsisting claims to the land about to be located by him? We may look in vain through the record for any facts which were calculated to put the locator on enquiry. Here was a large area of unoccupied country, really unadapted to the purposes of colonization; having lain sixteen years from the date of the alleged grant to Cano, unused, unmarked, and apparently uncared for. Absolute and very pointed notice would be required under such circumstances to warn off a locator.

There was an effort made to supply this want of actual and constructive notice by the testimony of Ed. Lynn, who exhibited excessive partiality for the Plaintiffs. This witness, after giving vent to his *legal conclusion*, by saying that Cook and White knew of the Cano grant, recollects himself, and qualifies his assertion as to Cook, and in effect says that White knew of this claim but does not know that Cook did.

No privity exists between White and Cook. This then, is all the testimony upon that subject. Is it upon such evidence that the important rights of a party, otherwise perfect, is to be wrested from him? Under these circumstances there can be no question that it was erroneous for the Court to permit the Plaintiff's title to be read in evidence without additional proof, and much more so to have refused the 2d instruction asked for by the Defendants; by refusing which the Court took upon himself to decide both the law and the fact on that point; not leaving even the question of notice or the fact of the deposit of the title in the Land Office to be considered by the jury.

We wish to call the attention of the Court to an agreement made between the parties and filed in the case: Rec. 42, 43, 44; and the motion in the Court below, under that agreement, to introduce the record and files of the case of Brumley and Jones vs. Cook *et al*, then pending in the District Court of Harris county, upon which the Court denied the motion, refused to admit the evidence, or to frame or submit any issue to the jury as to the jurisdiction of the Court.

This is another instance showing a disposition on the part of the Judge to persist in maintaining jurisdiction of and adjudicating the case.

The question would arise on a plea; and the agreement that "the defendants might prove every fact which they could under any *plea whatever*," is so comprehensive as to make the ruling of the Court upon that question ridiculously erroneous. It was alleged that there was another suit between the same parties in interest and for the same cause, but in a different form of action. The adjudication of that cause would have settled the rights of the parties in this suit. Was it not the duty of the Court, then, to have arrested the further progress of this suit until a disposition of the other suit had been made?

The Defendants had, for a long time, been harrassed with a suit in the State Court for the same cause, and still left there to protect and defend their rights, while they are also dragged into the Federal Court and kept in both until the Plaintiffs can try the experiment of a new tribunal, having the former to fall back upon in case the latter should be likely to prove unsuccessful. As to the practice our State Courts have adopted in such cases, will be seen by reference to Payne vs. Benham, 16 Tex. Reps., 364.

We desire now to review the rulings of the Court below, during the progress of the trial, upon the admissibility of some of the testimony; particularly the exclusion of the deposition of Henry Beaumont: page 106–107. The objection to this deposition, it will be seen, was made for the first time during the trial. Taking it for granted that the motion to exclude this testimony states the truth—which it does not, as notice was in reality given—there is the statute of the State regulating the manner in which objections of that nature should be made: Art. 461, Oldham and Whites Dig, provides that "no objections to the form of depositions or to the manner of taking them, in any suit, shall be heard unless they are in writing and notice given, &c., *before the trial of the suit commences.*" This would seem to be sufficient to settle that point, but to make the ruling of the Court more absurd, there is the agreement of the parties: page 42–43 Rec., that "all objections are withdrawn to the form and manner of taking depositions, &c. Further comment here is unnecessary, as the objection is purely to the form and manner of taking the depositions, and it cannot be said that the testimony was immaterial; in fact it was of too much importance for the adverse party to permit it to be read without an effort to exclude it. There were also portions of the testimony of R. W. Moore, John W. Swartz and James Howerton excluded: See Rec., page 113–114. If the excluded portions were not statements of facts, we have nothing to say. But they state the occupancy of Cook and those holding under him, for a certain length of time, which might be an important fact in view of the defence of the statute of limitations. We know of no more clear and expressive term to denote occupancy than is used by the witnesses.

In discussing the question of the validity of the deed introduced by the Plaintiffs in the District Court, from Manso to Greyson, page 57, which was excepted to, and instructions asked for by the Defendants and refused, "that if Manso was an alien enemy at the time of the execution of the deed, he conveyed no title:" 1st instruction, page 190. We take the principle as settled, that if he was an alien enemy to the Republic of Texas at that time, war existing then between Mexico and Texas, the deed to Greyson, a citizen of Texas, is a nullity. By the refusal of this instruction, and the admission of the deed, the fact as to whether he was an *alien enemy* at that time was excluded from the consideration of the jury, and we are satisfied erroneously so.

Can it be contended, after what was proved regarding the then status of Manso, that there was not enough shown to entitle the

question to be presented to the jury? Let us see what we find in the record: First, we find proved by Caravajal, page 71—their own witness—that Manso came to Mexico quite young; took part in the Mexican revolution, espousing the Mexican cause; in 1821, afterwards an officer in the Mexican army, and thereby became a Mexican citizen. The subject of his nativity we regard as immaterial. In looking over the testimony touching the history of this Manso, we find first that he was a military officer under the Mexican government, then a civil officer under the same government; that he adhered to the same after the declaration of the Texas independence; continued to reside in Mexico, and *never* in Texas after she became a separate government: testimony of Caravajal, 71; Nicholas Benividos, 74; Iori Gama, H. Clay Davis and John D. Wright, 116-117; add to this his own declaration in his deed to Greyson, that he was a citizen of Mexico. Suppose Manso did go to Louisiana? His going there appears to be temporary and for a specified purpose; one was schooling his children; another was, undoubtedly, the disposing of the lands serruptitiously acquired in Texas. These done, he returns, *not to Texas*, but to Mexico—never having lost his domicil there. If, therefore, he was a Mexican—an adherent to the Mexican cause—whatever his nativity may have been—not having lost his domicil there—his relations to Texas were those of an alien enemy, at the time of making this deed to Greyson, *who was a citizen of Texas.* We do not ask this Court to assume the province of a jury in this matter, and to decide this question of fact; nor do we ask the Court to say that Manso was an alien enemy at the time of the deed to Greyson, a citizen of Texas; but we do insist upon being granted the privilege of submitting the question to the jury, that *they* may tell us. There is testimony enough on that point, if not conclusive, to have warranted the Court in giving the instruction asked for.

Regarding the 4th instruction asked for, and refused—"That if the Plaintiff's title included an island it was bad, as to the island," there was evidence showing that the land claimed by Cook was an island: Thielapapa, 136. Then, why was not the instruction given? If it was an island, the bay shore was in its rear, and the league claimed by them, they contend is bounded by the bay shore, which view is fortified by the fact that the third line of Beaumont's survey runs its distance at a point on this very lagoon which separates this island from the main land. In this way, only, could the lines be made to close by the field notes in this grant. Hence the importance of this instruction.

The 5th instruction asked for and refused, is somewhat allied to the 4th. We must take the survey of the surveyor appointed by the Court, aided, as it is, by the evidence of Thielapapa, 136, to govern us in the termination of the third line of the Cano league, which runs its distance and terminates on the lagoon before reaching what they claim to be the bay shore. If we are correct, we must treat this lagoon, connecting as it does with Powder-Horn Bayou, as their boundary line, leaving out of their boundaries Cook's 179⅛ acres, in which case both titles can stand and no conflict owner.

This survey of Beaumont, made by order of and for the special information of the Court, and which is indispensible to a fair adjudication of the matter, and the ascertaining whether their alleged title does coflict with our location, must be taken as correct unless it is impeached, and if it is impeached and rendered unreliable, then we may say we have no survey as required by order of Court. If so, is it not the duty of this Court to send the case back to an inferior tribunal, directing another survey to be made and the lines definitely ascertained? Otherwise, it makes the jury the actual surveyor.

In this connection, we say that the instructions given at the request of the Plaintiffs below, *assert facts which are not shown.* What evidence is there that the original survey, purporting to be attached to the Cano grant was surveyed by one meridian, and Beaumont's survey by another meridian? What authoaity had the Court in saying so to the jury in his instruction? The only testimony on this point is Tipton Walker: Rec. 150, and he says he *cannot* say but that both surveys were by the same meridian. We can only look upon this as another attempt on the part of the Court to assume the province of a jury; or rather as dictator, direeiing the jury what were the facts, as *he* had seen fit to *find* them.

The verdict in this case was clearly inconsistent with the law and evidence. Any other result, perhaps, could not have been expected, with a prejudiced Court and all the rulings, before and during the progress of the trial against Cook and his co-defendants; and in addition to the points above mentioned, wherein the law and evidence has been disregarded by the pressure of the erroneous rulings, we present the question of limitation.

By the limitation law of Texas, Art. 1328, Oldham and White's Digest, it is provided "that every suit to be instituted to *recover* real estate as against him or those in possession under *title* or *color of title*, shall be instituted within three years next after the cause of action accrued." The location or entry of the portion claimed by Cook was made on the 5th day of January, 1847, Rec., page 138; first, to the amount of 320 acres, but afterwards, all but the 179¼ acres released, and the survey was made of the 179¼ acres on the 15th of May, 1850: Rec. 140. So soon, therefore, as Cook or those under him took possession, their right of action accrued. Now, when was that? First, we will take the evidence of their own witness, Charles Mason, Rec. 155–156, by which it appears as early as October, 1850. Carlin, who is shown to be then under Cook, was in possession of the tract claimed by Cook: Thielappa, Rec., 136, says he was there as early as 1847. Taking all the testimony on this point, there can be no doubt that prior to the 10th of October, 1850, the possession commenced. If there was any temporary interruption in the possession it would not matter, if there was no intention of final abandonment: See case of Whitehead et al. vs. Folly et al, manuscript decision of Supreme Court of Texas, 1866. There can be no question then that Cook's possession commenced more than three years before the commencement of this suit, if not more than ten.

And now we will call the attention of the Court to the fact that this action was not a suit to "*recover* real estate," until the indorsement required by statute—Oldham and White's Digest, Art. 2039—was made on their petition, of the nature of the action. Until that was done, it was simply an action of trespass for damages. This indorsement was first made in June, 1859, Rec. 22. If this position is correct, the running of the statute was not interrupted until that time, because, in the language of the statute, it must be a suit to "*recover*" the land. We contend, therefore, that the bar was complete, and that the verdict was clearly against the law and the evidence.

And allow us to remark that if there was ever a case where a defence of this nature assumed a meritorious attitude this is one. Here was a tract of sixteen leagues of land claimed by one party; this portion in controversy being apparently unowned, unoccupied and uncared for by any other persons; an uncultivated waste, was taken in good faith by the Defendent, Cook, and by his sagacity and enterprise was redeemed from its wild state, and the spot once the subject of *fancy* speculation, by distant and invisible parties, has, through the auspices of this same person, Cook, become a thriving commerceal town, the growing tendency of which, at the time of the commencement of this action, excited the cupidity of these unjust claimants.

W. & A. L. MERRIMAN.

In the Supreme Court of the United States.

No——.

WM. M. COOK AND OTHERS, Plaintiffs in error,

vs.

THE HEIRS OF BURNLEY, AND R. A. PORTER, Defendants in error.

Writ of Error from the District Court of the United States for the Eastern District of Texas, at Galveston.

Suit was brought October 13th, 1853, and judgment obtained May Term, 1859, in the Court below, by the defendants in error, Burnley and Porter, to recover from plaintiffs in error, Cook and others, a league of land situated in Calhoun county, granted to Juan Cano. The suit was in the usual form in Texas of "Trespass to try Title." The plaintiffs' title is substantially the same, all the mesne conveyances being identical, with that involved in the case of White and others vs. Burnley, decided by this Court, 20th Howard, 235. January Term, 1854, defendants filed pleas of "the general issue," and "statute of limitations," (8, 9,) and agreement was made, entitled in the above case of Burnley vs. White and others, (20th Howard) providing for taking testimony on the merits in a series of cases of the same class of titles; and also, that "in that and the several cases involving the controversies about the coast leagues, where Burnley is a party, all the pleas except the general

issue be withdrawn, and that under this plea the defendants may prove every fact which they could under any special plea whatever." (11.)

February 26, 1855, defendants filed a plea in abatement, alleging pendency of a suit commenced in the District Court of Calhoun county February 4, 1853, by said Burnley and one *Levi Jones* as plaintiffs, against W. M. Cook, J. H. Baldridge, J. W. Baldridge, Sparks, Chipman and Solomon Cunningham, setting forth title to the Juan Cano league of land, and laying out of a town site thereon, the location thereon by Cook of a land certificate for 320 acres, and commencement of a rival town enterprise, acts of trespass and waste, praying an injunction, which was obtained; also damages $10,000, and general relief, (13, 14, 15.) The striking out of the plea by the Court, on the ground set forth in plaintiffs' motion, 1st, That it was filed after answer to the merits, 2d, Not verified by affidavit, 3d, Not sufficient in law, (22, 23,) is the ground of the third bill of exceptions.

At the trial term, June, 1859, defendant, Cook, applied for a continuance, on the ground of the absence of a witness, having previously obtained two continuances on affidavit, and agreed to a peremptory order of trial, (26,) which was overruled, and defendants filed their first bill of exceptions.

After the overruling of this application, defendant, Cook, filed a motion for a change of venue, supported by an affidavit setting forth certain statements with reference to himself, in a publication alleged to have been made by the Judge of the Court below; his belief that the Judge had prejudged his cause; and that he could not obtain a fair and impartial trial, which was overruled, (30,) and defendants filed their second bill of exceptions.

The parties proceeding to trial, defendants offered as evidence, for the purpose of abating this suit, the record of the suit pending in the State Court, above pleaded, claiming its admissibility under the agreement of counsel, copied above.

(42, 43,) which was rejected by the Court, and defendants filed their fourth bill of exceptions.

The fifth bill contains defendant's exceptions to rulings upon the evidence in the course of the trial.

V. To plaintiff's testimonio of title to Manso, because—1st. Not recorded in the county. 2d. Not in the Land Office. 3d. Altered by map attached—not on stamped paper. All of which are manifestly frivolous and will not be further noticed.

VI. To the testimonio of conveyance from Leonardo Manso to Peter W. Grayson, made before a Notary in the parish of St. Landry, Louisiana, April 6, 1836, proved by the deposition of G. H. Bell, because—1st. Secondary evidence. 2d. A conveyance between alien enemies.

VII. Exceptions are taken to an instrument given by Grayson to Lambeth, showing interest of latter in lands held by Grayson and being the foundation of the conveyance made to Lambeth after Grayson's death, *as not material* (66, 67.) To conveyance from Lambeth to Jones as a mortgage, (67, 70.) To deposition of F. de Leon, as an interested party, because he was the commissioner who executed the title (12) and to the ruling out of part of Mrs. Wright's deposition as follows: "Manso was *never considered* a citizen of de Leon's colony." "Witness *understood, and so it was generally understood*, that Manso was traveling and made a short stay in the colony of de Leon," (75;) none of which require any further notice.

VIII. Defendants again offered in evidence the record of the suit in the State Court, which was ruled out by the Court.

IX. The Court ruled out the deposition of Henry Beaumont, taken *de bene esse* for want of proper certificate by whom the same was reduced to writing, or of notification to plaintiffs or their attorney, (106, 108.)

X. In depositions of Moore, Schwartz and Howerton, taken *de bene esse*, without notice, the witnesses stated:

"Witness knows that Cook and his tenants have had continuous possession of said land since the fall of 1849 to the present time." "Since fall of 1849 Cook, by his tenants and those holding under him, has had continuous possession of said land; said possession he knows to have been continuous." "As the tenant of Cook, as witness understood, that witness knows that said Cook, by himself and his tenants held possession continuously ever since May or June, 1850." Which statements were ruled out by the Court, on the objection of plaintiff. 1st. That they were conclusions of law, and not matters of fact. 2d. Were loose and indefinite, without names of persons, dates and times, or the facts in their mind constituting tenancy and possession, (113, 114.) Subsequent depositions of same witnesses, taken on notice and cross-examination, were read; all the *facts* known by them were fully stated, only their *conclusions* excluded, and the practical reasons why their legal conclusions of what constituted a "continuous possession by Cook and his tenants" are apparent. The object was to show a continuous possession by Carline, Hoffman and Elam, as tenants of Cook. Howerton explains: "I saw Carline on the said survey, living in a cloth tent," (151). Moore explains: "I do not think Elam went into possession of the place until two or three months after Carline left it." (151.) Schwartz explains: "I don't know what time Carline left the place at Powderhorn; I was not here at the time; I do not know that any person took possession of the place immediately after he left; Elam took possession of said place in the winter of 1851-2," (151.) Carline and Hoffman were wandering fishermen, running a boat and camping. Carline had the assent of Dr. Jones, plaintiffs' agent, for living on the premises, and during the time stated himself to be Jones' tenant. (Mason's deposition, 155; Howerton's, 160; Reuss', 161.)

The testimony of one of the "tenants," Hoffman, a witness examined before the Court, will throw some light on the effort to manufacture evidence of possession. Hoff-

man's deposition, taken *de bene esse*, without notice, was on file, in which he proved his own entry on the land, under lease, as tenant for Cook, in February, 1847; that Carline *joined him* in '48 or '49, and occupied as Cook's tenant till about August 20th, '51, when he gave possession to Cook, (286, 7.) This witness residing within a few miles of Galveston, was summoned to the Court by plaintiffs, (Cady, 183,) and defendants put him on the stand. He testified that he went to Powderhorn in '47 or 8, *with Neil Carline*, on said land as tenants of Cook; put up a shanty from material obtained from a wreck. Cook came riding along and gave us possession; left and went to Indianola to work with Judge Palmer, but left Carline in possession. On cross-examination he said he and Carline came from Victoria to Powderhorn, "stopped there on the logs and fished and oystered for several days." "Thought it would be a nice place for them to stay." Carline told him the land belonged to Col. Cook; that *McDonald told him so when he worked for him on the wharf.* "Col Cook came riding along and gave witness and Carline permission to remain there;" when brought back for re-examination by Cook, Hoffman says, "when they (Carline and himself) first got to Powderhorn, *the wharf was standing over at LaSalle*; hasn't made any mistake about that," (136.) Now, the wharf was projected in the winter of '49–'50, commenced March, 1850, (Brown, 148,) spring 1850, (Mason, 155,) stopped by an injunction in the U. S. District Court; suit instituted April, 8, 1850. (See agreement of counsel, 176, 7,) and completed by agreement between Brown and others, with Jones, under the Burnley title, after the settlement of the suit, (Segui, 134.) Brown, who built the wharf, proves that Carline built the shanty from the wreck of the Jerry Smith in 1851, (148.) Mason, one of the wharf company, also proves that Hoffman and Carline came to Powderhorn in September, 1850; kept a boat, fished, lived at camp, and were employed by the wharf company.

Quoting further from Hoffman he says: "It was three

or four months after we first stopped at Powderhorn, when the steamship Mexico went ashore right against the mouth of Powderhorn." This was proved by her captain, Jerry Smith, to have been between the 15th of June and 1st of July, 1851, (164.) He says again, "that they had been living at Powderhorn five or six months when the cattle pen was built there." This was proved to have been Dec., 1851, (Mason, 156.) He says again he had "lived at Powderhorn with Carline part of the summer and winter, and then went to Indianola and lived with Judge Palmer," (131.) This was proved to be the fall and winter of 1850, (Palmer, 158.) So, his history of himself between the time of his discharge as a soldier of Col. Johnston's regiment in Mexico, in Aug. or Sept., 1846, disconnected as it was, accounted for at least four years intervening prior to his going to Powderhorn, (131.) Finally, this ignorant, irresponsible old man gave an explanation of the circumstances under which his deposition *de bene esse*, was taken, *exparte*, at Hempstead, Texas, on the affidavit of Cook that Hoffman lived at Hempstead, more than 100 miles from the place of holding the court, and from the residence of plaintiffs or their attorneys.

"Witness resides at Campbell's a little above Virginia "Point about five or six miles from Galveston—has lived "there several years—made it his home, but knocks about "when I can get a job of work, now over at Bolivar Point, "six or seven miles from Galveston, repairing a boat. Col. "Cook came over and said he wanted me to go to Hempstead "and he would give me a good job of work to build a mill; "went with Col. Cook; went on the steamboat together to "Houston, then took the railroad cars to Hempstead; got "to Hempstead about 11 o'clock. In about an hour Col. "Cook said we had better attend to that other matter.— "Counsel asked, what other matter? Said, giving the dep- "ositions. Witness went over to the notary's, another Mr. "Cook; gave him the paper. Counsel asked, what paper? "Replied, the paper Col. Cook gave the witness on the cars "going up. The notary copied it off. It read about right, "and witness signed and swore to it. Next day witness "and Col. Cook came back to Houston and then down to

"Galveston together. Question—Who paid the expenses of "your trip? Answer—Col. Cook. Question—Did he pay you "anything else? Answer—He allowed me two dollars a day. "Question—Did you swear in that deposition that you lived "at Hempstead? Answer—Oh, no! could not have done "that. Question—Did you swear that you settled at Pow- "derhorn as Cook's tenant, in Feb., 1847? Answer—Well, "it was along about there, some time; don't recollect ex- "actly what year. A paper was produced to witness, and "he identified it as the paper handed to him by Col. Cook "on the cars, and from which the notary copied his deposi- "tion. Counsel of Cook admitted that the paper was in "Cook's handwriting."

Plaintiffs proved the residence of Sam Harding, a tenant of plaintiffs on the Juan Cano league from the spring of 1848 to time of trial. Dr. Levi Jones, plaintiffs' agent had resided on the same league from April, 1851, Brown (149.) See lease to Harding, (182.)

Defendants' title was as follows:

Certificate for 960 acres of land issued to A. N. Gwartney, Dec. 15, 1837, (102.) Conveyance of same by Gwartney to Cook, Dec. 16, 1837, (103.) Survey of 179½ acres of land north of Powderhorn Bayou, with 1,100 varas front on the bay, by virtue of said certificate, made May 15, 1850, (104-5.) Location of this certificate, as follows:

"Location No. 339, January 5, 1847. To the County "Surveyor of Victoria county: Will please survey 320 "acres on bounty warrant, No. 990, on Matagorda bay at "the mouth of Powderhorn Bayou, on the north-west side; "thence up the bay and back for quantity. William M. "Cook."

This was claimed as a location of the 179½ acres of land to date, and sustain the plea of limitation from January 5, 1847.

Patent for said 179½ acres of land issued May 16, 1857, (109.)

To show that Cook had *abandoned* his location of the Gwartney certificate, of Jan. 5, 1847, plaintiffs proved by the deposition of Edward Linn, surveyor of Victoria county,

certified copies from the record, of a location made by Wm. M. Cook, as follows:

"Location No. 429, Sept. 12, 1849. William M. Cook "locates land warrant No. 5,072, issued to James A. Wells, "for 320 acres of land, commencing at the east corner of a "survey made for D. N. White, on the south-west side of "Matagorda Bay; thence down the bay to Powderhorn "Bayou; thence up the Bayou and back, for quantity." (139.)

Also a survey of the same 179½ acres north of Powderhorn Bayou, made by the said Wm. M. Cook, by virtue of land certificate to James A. Wells, May 15, 1850, (139,) recorded 29th same month, and on the 13th Jan., 1851, by the direction and request of said Wm. M. Cook, the field notes and survey of this 179½ acres were altered and transferred to the land warrant, 990, the Gwartney certificate.

The town site laid off by Jones, agent for plaintiffs, on the Juan Cano league, was on the south side of Powderhorn bayou, called *LaSalle*. John Henry Brown and others, residents of Indianola, which is about — miles north of the bayou, believing that the proper town site was immediately north of the bayou, proposed to Jones by letter dated February 6, 1850, to build a wharf, and start the town at that point under him; but he says: My reason for writing a confidential note is to say that "so great is the interest felt here in this subject by the persons named and others, that rather than fail they would procure Mr. White's claim to the ground, and do the best they could with it." (See letter read in evidence by Cook, 189, 190.) Jones, proving impracticable, Brown and others commenced their wharf under the adverse title. That was obtained by a conveyance from the defendant, Wm. M. Cook, to said John Henry Brown, dated March 1st, 1850, of the one-half of the survey of 179½ acres of the *James A. Wells certificate, and location thereof, made September* 12, 1849. (See copy of deed, 179.) Brown having conveyed to Cook therefor the one-half of the D. N. White survey adjoining. (See Cook's affidavit,

177.) They called this "Brown's addition to Indianola," and Cook, by deed dated April 15, 1850, conveyed many lots to persons, in the same reciting his right as by virtue of of the *location of the Wells certificate in September*, 1849, (180.)

Cook's plea of limitation for the 179½ acres was based on the actual possession of Carline and Elam as his tenants, and of himself up to the commencement of the suit, of the house built by Carline. But Cook himself read in evidence the deposition of Charles A. Harper, one of the defendants in the suit, proving that the identical lot on which Carline's improvement was made was conveyed by Cook to Mrs. Harper, (114, 115,) and the deed therefor, dated July 15, 1851, was proved by plaintiffs, (171.)

XI. Defendants excepted to the refusal of the Court to give the following instructions to the jury:

"1st. If Manso was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which plaintiff can recover.

"2d. If plaintiff's title was not on record in the county where the land lies, or in the General Land Office, at the time defendant located his land warrant, and completed his survey and obtained his patent, he is in the position of an innocent purchaser, and entitled to recover.

"4th. If the plaintiff's title includes an island surrounded by tide water, it is bad as to the island.

"5th. If the jury, from the evidence, can fairly and justly construe both the plaintiff's and defendant's title so that both can stand, it is their duty to do so."

XII. Defendants excepted to the following instruction prayed by plaintiffs, and given by the Court:

"The diagram or plot attached to the plaintiff's grant is evidence to show the designation and character of the land granted, and may be used by the jury for its shape and boundaries. It appears to have been surveyed by magnetic courses, and if the survey returned by Beaumont was not surveyed by the magnetic, but the true course, the jury must allow for the difference, and Beaumont's cannot be regarded as showing the original survey. The fourth call is from the

end of the third line with the bend of the 'Laguna Madre' of Matagorda to the beginning."

XIII. Defendant, Cook, moved for a new trial, on the ground of errors of law embraced in his previous exceptions, and on the further grounds that Cleveland, the Deputy Marshal who summoned the jury, was not a lawful deputy; that several of the jurors lacked the qualifications required by law, which he had ascertained only since the trial of said cause, specifying, under affidavit by said Cook, that P. N. Carey was an alien, and Thomas Snipes not a freeholder or householder. The testimony on this motion was that Cleveland was deputy for Ben. McCulloch, United States Marshal, who resigned, to take effect April 1, 1859, but his successor, Henry McCulloch, was not qualified and did not act until May 7, 1859, up to which time Cleveland continued to perform the duties of Deputy Marshal. The venire was returned, "Received and executed March 23d, 1859." It was filed in the Court the first Monday in May. The juror Carey swore that he was a naturalized zitizen. Snipes swore that he owned land, but "that Col. Cook had tried repeatedly to get him to give an affidavit that he was not a freeholder or householder. Witness refused to do so; told Col. Cook he would not ruin his character for him or any other man. Col. Cook said witness should not lose anything if he would swear to that," (200.)

The Court overruled the motion for new trial, and defendants filed their sixth bill of exceptions.

POINTS AND AUTHORITIES FOR DEFENDANTS IN ERROR.

I. Overruling application for continuance cannot be assigned for error. (Marine Ins. Co. vs. Hodgson, 6 Cranch, 206; Barron vs. Hill, 13 How., 54; Conkling on Jurisdiction, 631, and refs.

If the question of discretion could be looked into, it was most properly exercised. The suit had been pending over five years. Defendants had already obtained several continuances on affidavit, and by their own agreement, entered as an order of the Court, were under a peremptory rule for trial, (16.) Under these circumstances, a few days before the trial, to summon a witness residing in Cameron county, (on the Rio Grande) as he casually passed through Galveston, make no tender of witness' fees to him, nor any other effort to procure his testimony, and then apply for a continuance for the want of his testimony on a point on which they had been taking depositions for years, was merely trifling with the Court.

II. Overruling application for change of venue cannot be assigned for error.

The Act of March 3, 1821, provides that "in all suits and actions in any District Court of the United States in which it shall appear that the Judge of such Court is in any way concerned in interest, or has been of counsel for either party, or is *so related or connected with either party as to render it improper for him, in his opinion*, to sit on the trial of such suit or action, it shall be the duty of such Judge, on application of either party, to cause the fact to be entered on the records of the Court, and also an order" certifying the case for trial, etc. (3 U. S. Statutes at Large, 643.

The test fixed by the law is "*the opinion*" of the Judge below—there is no other—his ruling is final, and not the subject of revision. In Virginia the statute provided, that when the Judge "is related to either of the parties, or in any manner situated so as to render it improper *in his judgment* to preside at the trial, it shall be lawful for such Judge to cause the same to be removed," etc. The Supreme Court of that Court say:

"Here the power is given, but its exercise is left to the discretion of the Judge. It is not for this Court to sit in judgment upon the manner in which he does exercise the

discretion, for it is to depend upon his judgment; and moreover, from the very nature of the act, the propriety of that judgment depends upon his self-consciousness, into which we cannt dive." Boswell vs. Flockheart, 8 Leigh, 367.

And see also Millison vs. Holmes, 1 Carter Ind. 45, Morris vs. Graves, 2 Carter Ind. 354; Hubbard vs. State, 7 Ind. 160; 11 Ind. 234; 12 Ind. 548; Hungerford vs. Cushing, 2 Wis. 397; exparte Banks, 28 Ala. 53.

A change of venue on account of the prejudice or interest of the Judge was unknown at common law, and exists only so far as conferred by statute: Boswell vs. Flockheart, 8 Leigh, 367; Chambers vs. Hodges, 23 Texas, 111.

The mere motion on defendant Cook's affidavit, without notice, unsustained by any evidence whatever, is not even *prima facie* evidence of any *fact* whatever, but must have been supported by proof. Boswell vs. Flockheart, 8 Leigh, 367.

The motion was not made in proper time, but after long delay in the Court—after a motion to continue, and thus retain the cause in the Court—just on the eve of trial, without any notice, and should not have been regarded with favor, or as a proper appeal to the discretion of the Court.

Thus, in an application by the very same party, Wm. M. Cook, after a cause had been postponed to a given day, at his request, and he then came in and asked a change of venue, the Supreme Court of Texas say: "The application for a change of venue came too late to entitle it to favor or to consideration as a matter of right, especially as the delay in presenting it was not explained." The Court further remark upon the said Cook:

"The conduct of the defendants evinced a spirit of insubordination to law, a determination to accomplish their purpose, irrespective of the rights of the plaintiff, and regardless of the consequences. It was characterized by such acts of lawless violence and oppression as rendered it a proper case for the giving of damages, not merely to compensate, but to punish." Cook vs. Garza, 9 Texas, 361.

And see Moreland vs. Sanford, 1 Denio, 66; Moss vs. Johnson, 22 Ill. 633; Kelly vs. Downs, 29 Ill., 74; Perry vs. Roberts, 17 Mo., 36.

This statute has not been the subject of construction by the Federal Courts, so far as I have observed; nor does this case, I am sure, call for an attempt at any accurate analysis of the circumstances which should control the discretion of the Judge, so largely trusted in this law. That discretion must be exercised, not on grounds of sensibility or feeling by the Judge; but to subserve public justice, regard the rights of all parties, and maintain fairly the jurisdiction and dignity of the Courts. It might be most agreeable to a Judge, in case of ill-feeling or unpleasantness between a litigant and himself, not to try his case; but it is evident that to act upon this rule would enable every man of sufficient violence or want of principle to obtain a change of venue at his pleasure. He would only have to make an aasault upon the character or person of the Judge, infer resentment from the wrong thus committed, or force the Judge into some allusion to himself in self-defense, and then claim that justice could not be obtained from the Judge. Any such rule would merely incite aggressions upon the Judge, aud license insubordination to the Court.

The facts set forth in the affidavit are all perfectly consistent with entire fairness and justice on the part of the Judge toward the affiant. It requires but slight experience of human nature to be aware that a Judge, conscious of public enmity towards him by a litigant, would be careful to give him the fullest measure of justice, not only to guard his own bosom against the sense of wrong, but to afford that satisfaction to the public that he was impartially administering justice, which is recognized to be a duty of all Judges. But this affidavit does exhibit the unscrupulous, vindictive, lawless spirit of the affiant. It is not in this record, but you have only to infer the equal readiness to resort to personal violence as to libel, by a man "without respect for the rights" of others, and "regardless of conse-

quences," and to know the effects of such violence in the minds of men who commit it, to make it apparent that to sanction such an affidavit would be equivalent to declaring that any defendant who desires a Federal Judge not to try his cause, and the delay, expense and difficulty incident to its removal, who will make open demonstration of hostility against the Judge—malign him by libel, or assail him with a bludgeon, shall be thereby entitled to the delay and removal of his cause.

III., IV., VIII., The plea and record of another suit pending in the State Court,

1st. Can not be assigned as error. Sec. 22 of the Judiciary Act provides, that "there shall be no reversal on writ of error for error in ruling any plea in abatement other than a plea to the jurisdiction of the Court;" which applies to the plea of another suit pending in the State Court. Picquignot vs. Penn. R. R. Co., 16 How., 104.

2d. Were offered after plea to the merits, and for that cause should have been excluded on elementary principles.

3d. The claim to introduce evidence *in abatement* under the agreement made in this and a number of other cases by which all the special pleas to the merits were withdrawn, and that under the general issue "the defendants might prove any fact which they could under any special plea whatever," was absurd.

All the pleas filed were pleas to the merits. The tendency of the system of pleading which prevails in Texas, more than once reprobated by this Court, is to cumulate special pleading. But "special plea," *ex vi termini*, as well as by the manifest design in which it was used by the parties, means pleas in bar to the merits. Burrill's Law Dic., "Special Plea;" Bouvier, "Plea in Bar;" Stephen on Plead., 202.

The agreement provided for taking evidence and preparing for trial on the merits. It had a practical point. One act in Texas provides that, in "Trespass to try Title," defendant shall only be required to plead the general issue.

(Paschal's Dig., art. 5307.) Another act provides that "Limitation" must in all cases be specially pleaded. (Paschal's Dig., art. 4629.) There are several distinct pleas of limitation: three years under title, or color of title; five years under a deed; ten years," etc.

The plain object of the agreement was to waive question as to the necessity of these special pleas—not to open the door (then closed) for a surprise years afterward, after the cause had been long at issue on the merits, and many depopositions taken, by an issue in abatement.

4th. The suit in the State Court would not, under any circumstances, have abated this suit.

a. They were in Courts of different sovereignties or governments, as to which the plea is inapplicable. White vs. Whitman, 1 Curtis, 494.

This Court say: "The power of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independent of each other within their respective spheres. * * * As if the line of division was traced by landmarks and monuments visible to the eye." Ableman vs. Booth, 21 How. 516.

b. They were not between the same parties. Burnley and Jones, the latter representing a temporary executory right, to terminate July 1st, 1852, were plaintiffs, and Cook, J. H. & J. W. Baldridge, Sparks, Chipman & Cunningham were representing in the State Court. Burnley & Porter, the latter representing his right to the fee, were plaintiffs, and Cook, Etter, Elam, Shephard, J. H. Baldridge, C. A. Harper, D. P. Sparks and S. A. White were defendants in the Federal Court. J. W. Baldridge, Chipman and Cunningham, defendants in the first were not defendants in the second suit. Etter, Elam, Shephard and White, defendants in the second suit were not defendants in the first suit.

The authorities are that the parties must be the same, Davis vs. Hunt, 2 Bailey, 415; Cornelius vs. Vanarsdallen,

3 Barr, 434; Adams vs. Gardner, 13 B. Monroe, 197; Wood vs. Lake, 13 Wis., 84; and are uniform that the plaintiffs must be identical, Wadleigh vs. Veazie, 3 Sumner, 234; Langham vs. Thomasson and wife, 5 Tex., 127.

c. The subject matter of the two suits, and remedy sought, were not the same. The first was an injunction suit calling in aid the equity powers of the Court, and although by the practice of the State Courts, the allegation of damages and prayer for general relief, gave jurisdiction also of trespass; yet this was not the main object of the suit—the trespass was only incidental, and such as was alleged against the defendants therein named, connected with the town enterprise. The last suit was an ejectment to try the title to the Juan Cano league of land and recover the mesne profits. The authorities are numerous to show that suits so substantially different are not within the rule. Wadleigh vs. Veazie, 3 Sumner, 165; Peak vs. Bull, 8 B. Mon., 428; 20 Conn., 155; 2 Sumner, 593; 22 Eng. L. & Eq. R., 62.

d. In trespass to try title pendency of another action between the same parties, is not a good plea in abatement. Hall vs. Wallace, 25 Ala., 438.

VI. The admissibility of the certified copy of Deed from Manso to Grayson, made in St. Landry parish, Louisiana, April 6, 1836, was expressly decided by this Court, 20 How., 250. See also Watrous vs. McGrew, 16 Tex., 506; Mauri vs. Heffernan, 13 John., 73; Bailey vs. Johnson, 9 Cowen, 115; Durton vs. Hill, 4 Hayw., 73.

This Court also settled the question of alien enemy arising on the face of the deed, 20 How., 250.

IX. The deposition of Beaumont, excluded by the Court, lacked the requisites of a deposition *de bene esse*, under the 30th section of the Judiciary Act. 1st. It requires the officer to certify that it was reduced to writing by himself, or by the witness in his presence. 2d. The certificate of notice was insufficient—it was not "*from the magistrate*,"

as the act requires; nor was the fact of any notice at all shown, except "as does fully appear from the certificate of D. N. Stapp, witnessed and attested by the seal of J. Ashworth, N. P. for the State of Texas, now in my possession" —nor does it appear where the notice was given, nor whether it was of one day or five minutes. The agreement waiving objections to form of taking depositions, then on file, was made Feb. 23, 1854. Beaumont's deposition was taken Feb. 4, 1856.

X. The Court properly excluded parts of the depositions of Moore, Schwartz and Howerton. All the facts shown by those witnesses were admitted; but their general conclusion that "Cook by his tenants, or those holding under him, had had continuous possession," was excluded. These were not statements of fact, but inferences or conclusions of law, often of the most delicate and difficult character; and in this case, contradicted by their own detail of facts and positively false. (Parker vs. Haggerty, 1 Alabama 632.)

The case was one calling for a strict rule discriminating between matters of fact and legal conclusions. The depositions were *ex parte*, and testimony shamelessly fabricated.

The evidence is positive, and without fact or inference to the contrary, that the entry of location of the Gwartney certificate, No. 990, made by Cook, January 5th, 1847, was *abandoned*, and in its stead location of the James A. Wells certificate made on the same ground, September 12, 1849, and survey thereon, made May 15th, 1850, and this survey altered to the Gwartney certificate, No. 990, January 13th, 1851; (Linn's deposition, 138, 140,) and it is clear that if any possession had been held by Cook prior to—say at the earliest—September 12, 1849, (which there was not, but on the contrary Harding was then in possession under a lease from plaintiffs,) there would have been no location to sustain it.

Permitting the Gwartney location to remain without a a survey for over three years, without any survey, and without any evidence that the Gwartney certificate was on file

with the surveyor, would of itself presume its abandonment. (Lewis vs. Durst, 10 Tex., 416; Williams vs. Craig, 10 Ib., 398; but in addition we have the location of another certificate under which survey was made on the same ground, and under which title was claimed in the most public and notorious manner. (See Cook's deeds to Brown, 179, and to numerous other parties, 180.)

Possession must have been under the *same title*—could not have been part of the time under the Gwartney location, part under the Wells' location. (Williamson vs. Simpson, 16 Tex., 444. 5.

The questions of abandonment and possession were for the jury, and were properly submitted to the jury, and no exception taken thereto; but it is apparent from the record that defendants could not have had three years possession under a location prior to the suit brought.

The only lot on which there was any actual possession was conveyed by Cook to Harper. (See Harper, 114; Cook's deed, 172.) And this possession then ceased to be the possession of Cook. (Cunningham vs. Frantzen, 26 Tex., 34; Neill vs. Cody, Ib., 286; Mosely vs. Withie, Ib., 720.)

Plaintiffs were also in possession under their title by Harding from prior to spring of 1848; and by Dr. Jones from April, 1851; and defendant could hold no *constructive* possession against the possession of the superior title, as is too well settled to require authorities. 26 Tex. 78.

XII. The instructions to the jury asked by the defendants below were properly refused.

1st. The right of Manso to convey was settled by this Court upon the same conveyance, in precisely a similar case. (20 Howard, 250.)

The instructions asked by defendants, proposed no tests of fact or law to ascertain whether Manso was an alien enemy or in circumstances which enabled him to convey, but simply left it to the jury to decide the question whether or not he was an alien enemy. This was absurd. The tes-

timony showed clearly that his leaving Texas was compulsory. (Benevides, 74; Mrs. Wright, 75.) Also, that it was temporary at the time, and he remained in Louisiana, educating his children, until after the close of the Texas revolution. (Carvajal, 71.)

The question is not before the Court; but I take leave to say, that a careful examination of authorities shows that an executed conveyance of lands, made between alien enemies during war, will not, after peace, be held void at law, or as failing to vest the title upon the mere objection of third parties, strangers to the transaction. It cannot be enforced during the war. As between the parties themselves no executory contract or right could be enforced by a Court—but the conveyance is *executed*, it passes the legal title, and strangers cannot deny its operation.

In the noted case of Fairfax vs. Hunter, 7 Cranch., 603, the question turned upon the devise of Lord Fairfax, a citizen of Virginia, who died in December, 1781, to Denny Fairfax, an Englishman. This Court say:

"The next question is as to the nature and character of the title which Denny Fairfax took by the will of Lord Fairfax, he being at the time an alien enemy. It is clear by the common law that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. (11 Hen., 4, 26; 14 Hen., 4, 20; Co. Litt., 2b.) Nor is there any distinction whether the purchase be by grant or by devise. In either case the estate vests in the alien. (Pow. Dev., 316; Park. Rep., 144; Co. Litt., 2b;) not for his own benefit, but for the benefit of the State; or in the language of the ancient law, the alien has the capacity to *take* but not to *hold* lands, and they may be seized into the hands of the sovereign. But until the lands are so seized, the alien has complete dominion over the same. * * * *We do not find that in respect to these general rights and disabilities there is any admitted difference between alien friends and alien enemies. During the war the property of alien enemies is subject to confiscation, jure belli, and their civil*

capacity to sue is suspended. (Dyer, 26; Brandon vs. Nesbitt, 6 T. R., 23; 3 Bos. & Pul., 113; 5 Rob., 102.) *But as to capacity to purchase, no case has been cited in which it has been denied, and in The Attorney General vs. Wheeden and Shales,* (Park. Rep., 277) *it was adjudged that a bequest to an alien enemy was good, and, after a peace, might be enforced. Indeed, the common law in these particulars seems to coincide with the Jus Gentium.* (Bynk. Ques. Pub. Jur., ch. 7; Vattel b. 2, ch. 8, § 112, 114; Grot. lib., 2, ch. 6, § 16.")

The same rule was recognized in Craig vs. Radford, 3 Wheat., 599; Stephen vs. Swann, 9 Leigh, 404; Yeo vs. Mercereau, 3 Harr., 387.

It is true, the law declares contracts between alien enemies illegal, and they cannot be made the cause of action in Court. So with all contracts based on immoral or corrupt consideration, or for gaming, etc., etc. But this applies to *executory contracts*, as to which the action of the law may be requisite for their enforcement. And if a party actually pays money, or delivers property, as the result of any such contract, the law recognizes and leaves the transaction as it finds it, and will not assist him to reclaim it back. And a deed of lands made to compound a felony, defraud creditors, or for other illegal consideration or purpose, being executed and consummate, vests the title, and the grantor himself, much less strangers, cannot deny its operation. This general principle is well expressed in Inhabitants of Worcester vs. Eaton, 10 Mass., 378.

"If, then, the composition of a felony, or of a larceny, is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a court of justice; nor can the other party, if he has paid it, recover it back again. There must, then, be a distinction between a conveyance of land and money paid on such consideration, or Betsy Flagg could not on this ground avoid her deed to Fiske & Hudson, by entry or action, so as to convey any title to the demandants. Such a distinction was attempted in the argument, but we find no foundation for it. A deed of bargain and sale, signed, sealed, delivered, acknowledged or recorded, is an actual

transfer of the land to the grantee, as much as the delivery over of a sum of money or of a personal chattel is a transfer of either of these." And see 1 Story's Eq. Jur., s. 289, et seq. and reference.

2. The second instruction asked by the defendants is in the face of the decisions of the Supreme Court of Texas, which, although it has gone farther than any other State has ever done in making the junior title from the government, without notice of the superior title, an innocent purchase, expressly holds that record of the senior title in the county, its deposit in the land office, *inscription on the county map, or actual notice to the junior grantee*, deprives him of that character. Guilbeau vs. Mays, 15 Tex., 410; Byrne vs. Fagan, 16 ib., 391.

Linn, the surveyor, proves that the De Leon titles (including Juan Cano's) were inscribed on the county map as early as 1838, and that White and Cook made their locations with actual notice of them, (142.) An occupant under the Juan Cano grant was in actual possession as early as 1846. See lease to Schwartz, (192)—and Harding prior to spring, 1848, (Brown 149, Palmer 159.)

Pretence of ignorance of the locations of the De Leon grants is a mere sham. No titles in Texas were more noted. The locators were marauders, respecting no rights, and relying on such pretexts, to overturn legal and vested rights, as to just men, are only frivolous.

3. The fourth instruction asked by defendants is strikingly of this class. The law of Texas, passed Dec. 10, 1836, subsequent to the grant to Juan Cano, forbids the location of the "Islands" on the coast. Paschal's Dig., art. 4248. The defendant makes a location on the *locus in quo*, which, if it had been an "island," he could not have done, and then says the senior title, is void because the *locus in quo* is an "island!" Says their brief: "If it was an *island*, the *bay shore was in its rear*, and the league claimed by *them* is *bounded* by the *bay shore*." But how about Cook's title? His location was for 320 acres on "*Matagorda bay*," run-

ning "*up the bay* and back for quantity." His survey is on "the *west side* of Matagorda *bay*"—beginning and ending on the bay, and bounding on "*the bay and its meanders.*" What is meant in *his* title by "*the bay?*" Is it a little bayou, or the little lakes, "in rear" of the bay? and if not so in *his* title, why so in *ours?* This is too flimsy even for this case. The surveyor of Calhoun county, Henry Beaumont, who was attorney for Cook in taking his depositions in this case, (160, 163,) made a survey of the premises in controversy. The third line in plaintiff's grant was "N. 45° E., 5140 varas to a stake set on the bank of said Laguna," (Matagorda bay.) The fourth and last line follows the meanders of the bay to the beginning. But Beaumont, instead of running the third line to the bay, stopped 1300 varas from the bay, and made a corner in the midst of "a lake about 500 varas wide and 1400 varas in length," and from thence run fourth and fifth lines, totally disregarding the calls of the grant—as variant from the grant as shape and figure can be made, and founded upon no conceivable basis except to do the best he could, without scruple, for Cook, (123, 124.) Theilipapa was placed on the stand as a witness to sustain this survey. Beaumont had imposed on him a garbled copy of the field notes of the Juan Cano grant, containing the length but not the corners of the lines, by which Theilipapa made a map. But being shown, on his cross-examination, the calls of the grant, he said:

"In drawing said map he had reference alone to the calls of *distance* without knowing the call for the *corner.* As a "*surveyor, if the third line had purported to run to Matagorda bay, he should not have stopped it where it was, but would have extended it to the bay, but where a specific distance is given, would run that distance and designate it.*"

Thus are these subterfuges dispelled by their own witnesses. Along the entire coast of Texas, little tide-water bayous extend into the land, often connecting with each other and with the Gulf, or bays by other and similar chan-

nels. That these form "Islands," such as are reserved for the use of the Government, has never before been suggested, and is too absurd for serious consideration. This point has been invented since the trial of the case of White vs. Burnley, in 20 Howard. It might, perhaps, have juster significance if claimed by Cook as his title to an Island—*by Right of Discovery!*

4. The fifth instruction is also frivolous. The construction of the titles was for the Court. The defendants proposed to leave the jury to "construe" them on some vague, general principles of *fairness and justice*, of which they were also to be the judges, and which it was hoped might induce them to leave both titles to stand!

5. The only charge in the entire case granted at plaintiffs' instance, to which defendants excepted, was manifestly proper. The map or diagram of the land, made by the surveyor, as the evidence of the original survey, copy of which forms part of the testimonio of title, is evidence to the jury. Alexander vs. Lively, 5 Mon., 161.

The law under which the original survey was made required the course of the lines to be by the magnetic needle. Paschal's Dig., art. 727—and see 3 Bibb., 150, 9 B., Mon., 290. From Walker's testimony, (150,) all there was on the point, the survey of Beaumont was by the true meridian; and by comparing and platting the two maps, it is apparent that their meridians are different. The Judge properly left this to the jury from the evidence.

XIII. Overruling the motion for new trial cannot be assigned in error. 7 Cranch., 11; 4 Wheat., 213; 7 Wheat, 248.

None of the grounds entitled the parties to a new trial. Objections to the jury were too late. A litigant cannot accept a jury and, when it decides against him, commence enquiry as to the legal character of the officer who summoned the jury, or as to the qualifications of the jurors.

But each specified objection was false. Cleveland was Deputy Marshal by law until Henry McCullough qualified.